SUPREME COURT, U. S.
APPENDIX

JAN 3 1972
E. ROBERT SEAVER, CLERK

Supreme Court of the United States

TERM, 1971

No. 71-5078

DEAN RENE PETERS,
Petitioner,

—v.—

C. P. KIFF, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 12, 1971
CERTIORARI GRANTED NOVEMBER 22, 1971

Supreme Court of the United States

TERM, 1971

No. 71-5078

DEAN RENE PETERS,

Petitioner,

—v.—

C. P. KIFF, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Page
Record from the United States District Court for the Middle District of Georgia, Americus Division	
Petition for writ of habeas corpus filed March 16, 1970	1
Exhibit A—Sentence and order of the Muscogee Superior Court, No. 24927, dated December 8, 1966	7
Motion to dismiss filed April 8, 1970	11
Exhibit A—Department of Public Safety, Georgia Bureau of Investigation—Photographs and fingerprints	13
Exhibit B—Descriptive Report	14
Order on respondent's motion to dismiss, April 23, 1970	15
Notice of appeal	17
Docket entries	18

Page

Proceedings in the United States Court of Appeals for the Fifth Circuit

Argument and submission 19

Opinion, Morgan, J., March 11, 1971 20

Judgment, March 11, 1971 22

Per Curiam Opinion on petition for rehearing 23

Order granting petition for a writ of certiorari 24

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

Civil Action No. 709

[Filed at 12:30 P.M., Mar. 16, 1970 /s/ [Illegible],
Deputy Clerk, U. S. District Court,
Middle District of Georgia]

DEAN RENE PETERS, PETITIONER

vs.

C. P. KIFF, Warden, Macon Prison Branch,
Macon County, Georgia, RESPONDENT

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT, FOR THE MIDDLE DISTRICT OF GEORGIA, AMERICUS DIVISION:

1.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 2241 (c) (3), and the petitioner seeks, by this action to obtain post-conviction review of his conviction for the offense of burglary, and sentence of ten (10) years rendered against him on December 8, 1966, in Muscogee County Superior Court, Muscogee County, Georgia.

2.

The petitioner has not exhausted his so-called state remedies, on the constitutional issues raised and objected in this petition, due to the fact that there exist circumstances rendering such process ineffective to protect the constitutional rights of the petitioner.

The precise constitutional issues that the petitioner is now raising have been presented to, and rejected by, the Supreme Court of Georgia.

There is no utility in requiring the petitioner to exhaust his so-called state remedies since it is evident that

the state courts of Georgia will not consider or grant relief to the petitioner, therefore he has no substantial hope of relief in the state courts of Georgia. Thus, it would be futile to require petitioner to attempt to exhaust his so-called state remedies in the state courts of Georgia.

3.

The petitioner is 37 years of age, and a citizen of the United States of America, and residing in Macon County, Georgia.

4.

The petitioner is being unconstitutionally and illegally restrained of his liberty by being confined in the Macon Prison Branch, Macon County, Georgia. The person illegally restraining petitioner of his liberty is the Hon. C. P. Kiff, Warden, Macon Prison Branch, Macon County, Georgia. The cause or pretense for said restraint of petitioner's liberty is by virtue of and under a sentence issued and signed by Hon. John H. Land, Judge, Muscogee Superior Court, Chattahoochee Judicial Circuit, dated December 8, 1966. The sentence and order of the court was ten (10) years in confinement for the offense of burglary. A copy of said sentence and order is attached hereto, and marked as "Exhibit A" in this petition.

The petitioner is serving also, another burglary sentence of ten (10) years *consecutively* to his present sentence of ten (10) years. (emphasis supplied) The petitioner is challenging only the first conviction, sentence and judgment thereupon for the offense of burglary, and this is the sentence that the petitioner is presently serving.

5.

The petitioner has not knowingly, intentionally, intelligently or voluntarily waived, abandoned or relinquished any of his rights or privileges granted or secured unto him by the Constitution of the United States of America. Petitioner shows unto the court that his attorney for the conviction which is being challenged in this petition was disbared as an attorney in the State of Georgia, subsequent to petitioner's trial and conviction. In addition, any

choice or decision made by petitioner's attorney was made without prior consultation with petitioner, nor did petitioner participate in any decisions relating to pre-arraignment or pre-trial proceedings, or during the trial in chief.

6.

The petitioner was indicted by a Muscogee County grand jury on June 6, 1966, indictment #24927, and petitioner's original conviction upon this indictment was shortly thereafter. Petitioner appealed his original conviction on the burglary charge to the Court of Appeals of Georgia, and his original burglary conviction was reversed and remanded for re-trial. (Peters v. State, 114 Ga. App. 595) Upon re-trial, petitioner was convicted on December 8, 1966, with a sentence of ten (10) years. This conviction was appealed to the Court of Appeals of Georgia, and the conviction was affirmed. (Peters v. State, 115 Ga. App. 743) A motion for rehearing was denied by the Court of Appeals of Georgia.

On June 12, 1967, petitioner filed a petition for writ of habeas corpus, and an evidentiary hearing pursuant thereto, in the United States District Court for the Middle District of Georgia, Columbus Division. On July 5, 1967, petitioner was denied an evidentiary hearing upon his petition by the United States District Court for the Middle District of Georgia, Columbus Division, and his conviction was affirmed by that court.

Subsequent to the denial of the writ of habeas corpus and the evidentiary hearing pursuant thereto, petitioner appealed to the United States Circuit Court of Appeals for the Fifth Circuit. The United States Circuit Court of Appeals for the Fifth Circuit affirmed petitioner's conviction on the *exclusive and limited* grounds that the petitioner had not exhausted his so-called state remedies in light of the newly and subsequently enacted Habeas Corpus Act of 1967, by the General Assembly of Georgia. (emphasis supplied)

7.

The petitioner has been denied "equal protection of law" and "due process of law" under the Fourteenth Amendment to the Constitution of the United States of

America, in that the grand jury which indicted him, and the traverse/petit jury which tried, convicted and sentenced him to ten (10) years were unconstitutionally and illegally composed and drawn from respective jury boxes in that:

(a) The laws of Georgia, in effect at the time of petitioner's indictment by a Muscogee County grand jury on June 6, 1966, which controlled and governed the selection of grand jurors names to be placed in the grand jury box by the jury commissioners, and the ensuing venires, drawn by the Superior Court judge from the grand jury box, one of such venires which resulted in the grand jury that indicted petitioner, were unconstitutional in their application in that they: (1) systematically excluded Negroes from grand jury service; and, (2) absolutely, intentionally and totally excluded from grand jury service all non-property owners, or the lower socio-economic non-property owning class, of which petitioner is a member.

(b) The laws of Georgia, in effect at the time of petitioner's trial by jury on December 8, 1966, and his subsequent conviction and sentence pursuant thereto, and judgment thereupon, which controlled and governed the selection of traverse/petit jurors names to be placed in the Muscogee County, Georgia, traverse/petit jury box by the jury commissioners, and the ensuing venires, drawn by the Superior Court judge from the traverse/petit jury box, one of such venires which resulted in the traverse/petit jury which tried, convicted and set the ten (10) years sentence of petitioner, were unconstitutional in their application in that they: (1) systematically excluded Negroes from traverse/petit jury service; and, (2) absolutely, intentionally and totally excluded from traverse/petit jury service all non-property owners, or the lower socio-economic non-property owning class, of which the petitioner is a member.

8.

The jury commissioners of Muscogee County, Georgia, prior to and at the time of petitioner's indictment, were directed by Title 59, Georgia Code Annotated, Section 106,

to select the names of persons eligible for grand and traverse/petit jury service from the county tax digests which were maintained and organized on the basis of race or color pursuant to Title 92, Georgia Code Annotated, Section 6307.

The jury commissioners of Muscogee County, Georgia, prior to and at the time of petitioner's trial by jury, did in fact select the names of persons, from which the grand and traverse/petit jurors were drawn, that indicted, tried, convicted and set sentence upon the petitioner, from the tax digests which were in fact organized and maintained on the basis of race or color.

For these reasons contained within this paragraph, the petitioner has been denied "equal protection of the law" and "due process of the law" as is guaranteed unto him by the Fourteenth Amendment to the Constitution of the United States of America.

WHEREFORE, petitioner prays unto the Court as follows:

(a) That the writ of habeas corpus issue immediately to the Respondent, and that the Petitioner be brought immediately before the court;
(b) That the court inquire into the illegality of the petitioner's conviction, sentence and detention, and that the petitioner's Federal Constitutional claims be sustained;
(c) That the court set a time, date and place certain in order that the Respondent may show cause, if any, as to why the petitioner should not be released from Respondent's custody; and,
(d) That the Court grant petitioner any further relief that the court deems to be in the interest of justice in this cause.

This 16th day of March, 1970.

/s/ Edward T. M. Garland
EDWARD T. M. GARLAND
Attorney for the Petitioner

229 Candler Building
Atlanta, Georgia

GEORGIA, MACON COUNTY.

Personally appeared before me, the undersigned officer, duly authorized to administer oaths for and in said State and County, Dean Rene Peters, on behalf of himself, who after being first duly sworn, on oath deposes and says that he is the petitioner in this petition for writ of habeas corpus and that the allegations contained in the foregoing petition are true and correct.

/s/ Dean Rene Peters
DEAN RENE PETERS

Sworn to and subscribed to before me, this 5th day of March, 1970.

/s/ [Illegible]
Notary Public
Macon County, Georgia

[NOTARY'S SEAL]

My commission expires:
16th day of March, 1974

EXHIBIT "A"

GEORGIA, MUSCOGEE COUNTY
IN MUSCOGEE SUPERIOR COURT
December Term, 1966

BURGLARY

No. 24927 and Verdict of Guilty

THE STATE

vs.

DEAN RENE PETERS

WHEREUPON, it is ordered and adjudged by the Court that the Defendant DEAN RENE PETERS be taken from the bar of this Court to the jail of Muscogee County, and be there safely kept until a sufficient guard is sent for him from the Georgia Penitentiary, and be then delivered to, and be by said guard taken to said Penitentiary, or such place as the Director of Corrections may direct, where he, the said defendant be confined at labor for the full term of not less than ten years, to be computed according to law.

This the 8th day of December, 1966.

/s/ John H. Land
Judge Superior Court

EXHIBIT "A"

STATE OF GEORGIA
COUNTY OF MUSCOGEE

IN THE SUPERIOR COURT OF SAID COUNTY, JUNE TERM 1966 THE GRAND JURORS selected, chosen and sworn for the county of Muscogee to wit:

I Mose C. Cooper, Foreman

2. James Pearce Power
3. Norvell R. Boyd, Jr.
4. Robert J. Flournoy, Jr.
5. Sal V. Aglialoro
6. Glenn K. Albright, Sr.
7. Ronald L. Green
8. Cecil L. Andrews
9. Julian P. Goolsby
10. Irvin Rosenburg
11. John R. Bannister
12. Geo. W. Mendenhall
13. William C. Pease III
14. Fred D. Faulkenberry
15. W. Demar McEathern
16. Richard W. Summerlin
17. Hadley Murrah
18. Eugene C. Alford
19. Charles C. Bagwell, Sr.
20. A. Curtis Walker
21. Richard H. Bickerstaff, Sr.
22. James C. Metcalf
23. Gerald B. Saunders

in the name and behalf of the citizens of Georgia, charge and accuse Dean Rene Peters with the offense of:— Burglary for that said accused, in the county of Muscogee and State of Georgia, did on the 6th day of March, 1966 with force of arms, did unlawfully break and enter the storehouse and place of business of H. Rothschild, Inc., a corporation, the same being a place where valuable goods were contained, with intent then and there to commit a larceny, contrary to the laws of said State, the good order, peace and dignity thereof.

W. B. SKIPWORTH, JR.
Solicitor General

Special Presentment

The Defendant _____ Waives Copy of Bill of indictment, and list of witnesses sworn before the Grand Jury, and having been arraigned pleads not guilty.

_____
Solicitor General

_____
Deft's. Attorney

The Defendant Dean Rene Peters Waives Copy of Bill of indictment, and list of witnesses sworn before the Grand Jury, and arraignment, and pleads not guilty.

/s/ Frank K. Martin
Solicitor General

/s/ [Illegible]
Deft's. Attorney

(Min. 10, Folio 20)

24927

(Min. 9, Folio 506)

Sol's No. ____ Clerk's No. ____

MUSCOGEE SUPERIOR COURT

THE STATE

vs.

DEAN RENE PETERS

Burglary

W. B. SKIPWORTH, JR.
Solicitor General

TRUE BILL

/s/ M. C. Cooper
Foreman

Jun. 6, 1966

Special Presentment

WITNESSES:

_____

_____

_____

_____

_____

_____

We the jury Find the Defendant Guilty as Charged and fix the punishment at 10 years.

This the 8th day of December, in the year 1966.

/s/ [Illegible]
Foreman

(Min. 10, Folio 98)

[Certificate of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

Civil Action No. 709

[Filed at 8:30 A.M., Apr. 8, 1970 /s/ Pearl Wilkes, Deputy Clerk, U. S. District Court]

DEAN RENE PETERS, PETITIONER

v.

C. P. KIFF, Warden, Macon Prison Branch, Macon County, Georgia, RESPONDENT

MOTION TO DISMISS

Now comes C. P. Kiff, the respondent in the above-styled case, and before pleading to the merits of the petitioner's application for writ of habeas corpus; files this his motion to dismiss pursuant to rule 7B.

The respondent moves the Court to dismiss said application because:

1.

The merits of substantially the same issues were determined adversely to petitioner by virtue of order and judgment of the Honorable J. Robert Elliott, Judge of the United States District Court for the Middle District of Georgia, Columbus Division, entered in civil action number 1233 on July 5, 1967 and affirmed by United States Court of Appeals, Fifth Circuit, on June 6, 1968;

2.

Petitioner failed properly to exhaust his available State remedies;

3.

Petitioner failed to set forth a cause of action upon which relief can be granted.

/s/ Arthur K. Bolton
ARTHUR K. BOLTON
Attorney General

/s/ Harold N. Hill, Jr.
HAROLD N. HILL, JR.
Executive Assistant
Attorney General

/s/ Marion O. Gordon
MARION O. GORDON
Assistant Attorney General

/s/ Wade V. Mallard, Jr.
WADE V. MALLARD, JR.
Attorney

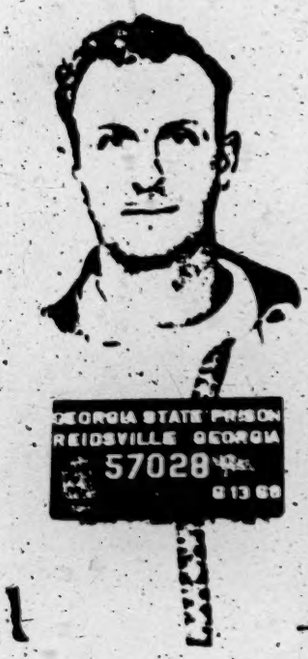
Please serve:

WADE V. MALLARD, JR.
P. O. Address:

132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

[Certificate of Service (Omitted in Printing)]

STATE OF GEORGIA
DEPARTMENT OF PUBLIC SAFETY
GEORGIA BUREAU OF INVESTIGATION
IDENTIFICATION UNIT
P. O. BOX 1456, ATLANTA, GEORGIA





...evill..., ...orgia
Received 6-13-67
From ...ecatur Co. Ga.
Crime ...urglary
Sentence 10 yrs. ____ mos. ____ days
Date of sentence 6-1-67
Sentence begins ____
Sentence expires ____
Good time sentence expires ____
Residence ____
Birthplace Cair..., Ala.
Nationality Amer
Age 33 34
Date of birth 9-?-33
Height 5-11
Complexion ...ddy
Hair Brn
Weight 175
Eyes Blue
Build ...ediu
Occupation ...lub ...anager

Scars and marks None visible

Notify in case of sudden illness Mrs. Virginia ...ers-417 ...e ...andy ...., ...dison, ...orgia
Same as above

Nearest relatives ____

Accomplices ____

(Please furnish all additional criminal history and police record on separate sheet)

"A."

EXHIBIT A

DESCRIPTIVE REPORT

RS

DC No. 1
PP-155

DESCRIPTION OF PRISONER WHEN RECEIVED

State Board of Corrections

Atlanta, Georgia

Gentlemen:

The prisoner named below was this day received from Ga. State Prison Reidsville, Ga.

Name RETT PETERS, Dean R. Alias _____

State Serial No. A-67848 Case No. _____

County in which convicted Muscogee County Crime Burglary

Sentence 10 Years Date Sentenced 6-1-67

Race White Age 34 Height 5-11 Weight 175 Build Med.

Color of Hair Brown Color of Eyes Blue Complexion ruddy Sex male

Scars None Visible

Occupation Club Manager Employed by _____

Father Roy E. Peters Mother Mother: Sara Cludia Peters

Marital Status Mrs Virginia Peters Children 5

In case of emergency notify Wife: Mrs virginia Peters 217 E. Peabody Apt. Columbus,

Date and Place of Birth Ozark, Ala. 9-9-33

Education 8 th Grade Member of Church Baptist

Last Address W/ Wife Previous Service Yes See FBI Report

In my opinion this subject is able to perform

Ordinary work in this camp ( ).
Light manual labor ( ).
Unable to perform any manual labor ( ).

C. P. Kiff,
(Name of Warden)

MACON PRISON BRANCH
MONTEZUMA, GEORGIA
County Public Works Camp

01-29-70
(Date)

"B"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

Civil Action No. 709

[Filed at 8:30 A.M., Apr. 23, 1970, /s/ Pearl Wilkes
Deputy Clerk, U. S. District Court]

DEAN RENE PETERS, PETITIONER

v.

C. P. KIFF, Warden, Macon Prison Branch,
Macon County, Georgia, RESPONDENT

ORDER ON RESPONDENT'S MOTION TO DISMISS

The Respondent in the above styled case has filed a motion to dismiss this petition for the writ of habeas corpus and has supported the same by brief.

A review of the file in this matter shows:

(1) That the merits of substantially the same issues here raised were determined adversely to Petitioner by virtue of the order and judgment of this Court entered in Civil Action No. 1233, in the Columbus Division, on July 5, 1967, and affirmed by the United States Court of Appeals for the Fifth Circuit on June 6, 1968. *Peters* v. *Rutledge*, 397 F.2d 731.

(2) That the Petitioner has failed to exhaust his available state remedies.

(3) That the petition fails to set forth a cause of action upon which relief can be granted.

For these reasons the Respondent's motion to dismiss is sustained and the petition is ordered dismissed.

This 22nd day of April, 1970.

/s/ J. Robert Elliott
United States District Judge

I hereby certify that I have this date mailed a copy of the within to Mr. Edward T. M. Garland, 229 Candler Building, Atlanta, Georgia 30303, and Mr. Wade V. Mallard, Jr., Assistant Attorney General, 132 Judicial Building, 40 Capitol Square, Atlanta, Georgia 30334.

This April 23, 1970.

/s/ Pearl C. Wilkes
PEARL C. WILKES
Deputy Clerk

Form No. 12: Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

Civil Action No. 709

[Filed at 4:15 P.M., May 18, 1970, /s/ [Illegible],
Deputy Clerk, U. S. District Court,
Middle District of Georgia]

DEAN RENE PETERS, PETITIONER

v.

C. P. KIFF, Warden, RESPONDENT

TO: Hon. Arthur K. Bolton, Attorney General, State of Georgia
Hon. W. B. Skipworth, Jr., District Attorney, C.J.C.
Hon. C. P. Kiff, Warden, Macon Prison Branch
Attorneys for Respondent

NOTICE OF APPEAL

Notice is hereby given that Dean Rene Peters, petitioner in the above-styled case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from an order of the United States District Court for the Middle District of Georgia entered on the 22 day of April, 1970, refusing the relief requested by his Petition for a Writ of Habeas Corpus and for a stay of execution.

/s/ Edward T. M. Garland
EDWARD T. M. GARLAND
Attorney for Petitioner

Suite 229
Candler Building
Atlanta, Georgia 30303

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

709

DEAN RENE PETERS

vs.

C. P. KIFF, Warden, Macon Prison Branch, Macon County, Georgia

For plaintiff:

Edward T. M. Garland
229 Candler Building
Atlanta, Ga. 30303

For defendant:

Wade V. Mallard, Jr.
Assist. Attorney General
132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

PETITION FOR WRIT OF HABEAS CORPUS

DATE 1970	PROCEEDINGS	Page No.
3-16	Filed Petition for Writ of Habeas Corpus, issued summons and delivered to U. S. Marshal.	2-12
3-16	J. S. 5 Report prepared.	
3-30	Filed U. S. Marshal's Return showing that Mr. Arthur K. Bolton was served personally at State Capital, Atlanta, Ga. on March 23, 1970.	13-14

DATE 1970	PROCEEDINGS	Page No.
3-30	Filed U. S. Marshal's Return showing that C. P. Kiff, Warden, Macon Prison Branch, Macon County, Ga., was served personally at Macon Prison Branch on March 27, 1970.	15
4- 8	Filed Motion to Dismiss and Notice of Motion.	17-22
4- 8	Filed U. S. Marshal's Return showing that Mr. W. B. Skipworth, Sol. Gen., Columbus, Ga., was served on March 24, 1970 at Columbus, Ga.	16
4-23	Filed Order of Judge J. Robert Elliott on Respondent's Motion to Dismiss sustaining motion to dismiss and dismissing petition.	23-24
4-23	J. S. 6 Report prepared.	
5-18	Filed Notice of Appeal and Certificate of Service.	25-28

No. 30081

DEAN RENE PETERS

versus

C. P. KIFF, Warden, Macon Prison Branch, Macon County, Ga.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
January 18, 1971

On this day this cause was called, and after argument by Edward T. M. Garland, Esq., for appellant, and Dorothy T. Beasley, Asst. Atty. General, for appellee, was submitted to the Court.

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30081

DEAN RENE PETERS, PETITIONER-APPELLANT

versus

C. P. KIFF, Warden, Macon Prison Branch, Macon County, Ga., RESPONDENT-APPELLEE

Appeal from the United States District Court for the Middle District of Georgia

(March 11, 1971)

Before RIVES, GOLDBERG and MORGAN, Circuit Judges

MORGAN, Circuit Judge: In this appeal a Georgia state prisoner attacks the denial of his petition for the writ of habeas corpus by the district court. We affirm.

Dean Rene Peters, a white man, asks that his conviction for burglary be set aside because Negroes were systematically excluded from the grand and petit juries which indicted and convicted him. See *Whitus* v. *Georgia*, 1967, 385 U.S. 545. Peters was convicted on December 8, 1966, and sentenced to a prison term of 10 years. On appeal the Georgia Court of Appeals affirmed the conviction. *Peters* v. *State*, 1967, 115 Ga. App. 743. Peters then sought a writ of habeas corpus in federal district court, claiming for the first time that his constitutional rights were violated by the exclusion of Negroes from jury duty. The district court denied relief and we affirmed its decision in *Peters* v. *Rutledge*, 5 Cir., 1968, 397 F. 2d 731, on the ground that Peters failed to exhaust his available state remedies by presenting the question of jury discrimination to the state courts under the

newly enacted Georgia Habeas Corpus Act of 1967 (Ga. L. 1967, pp. 835-839). Instead of returning to the Georgia courts for an adjudication of his contention, Peters re-filed a petition for habeas corpus in federal district court and from its refusal to grant the desired relief the instant appeal was taken.

Appellant Peters is quite correct in concluding that he no longer has any available state remedies which can be exhausted. 28 U.S.C. § 2254. Subsequent to our decision in *Peters* v. *Rutledge*, supra, the Georgia Supreme Court has unequivocally held that judicial review of jury discrimination is foreclosed when the accused offered no objection to the composition of the venire during the trial and the conviction occurred prior to the decision in *Whitus* v. *Georgia*, supra. *Davis* v. *Smith*, 5 Cir., 1970, 430 F. 2d 1256; *Strauss* v. *Grimes*, 1967, 223 Ga. 834, 158 S.E. 2d 404, cert. den. 391 U.S. 903; *Gresham* v. *Smith*, 1970, 226 Ga. 290; *Brawner* v. *Smith*, 1969, 225 Ga. 296. The presence of both these factors in the case at hand obviates the requirement of exhaustion of state remedies.

Turning to the merits of appellant's contention, we note that the identical issue was before this court in a proposed rehearing en banc in the case of *Salisbury* v. *Grimes*, 5 Cir., 1969, 406 F. 2d 50. Since the en banc court in the *Salisbury* case was dissolved, the law of this circuit stands as stated in *Mosley* v. *Smith*, 5 Cir., 1968, 404 F. 2d 346, where we held that a white man is not denied equal protection because he was indicted and convicted by juries from which Negroes were excluded. *Fleming* v. *Kelly*, 5 Cir., 1971, —— F. 2d —— [No. 26,872, February 9, 1971]. The denial of the petition by the district court is therefore

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30081

D. C. Docket No. CA 709

DEAN RENE PETERS, PETITIONER-APPELLANT

versus

C. P. KIFF, Warden, Macon Prison Branch, Macon County, Ga., RESPONDENT-APPELLEE

Appeal from the United States District Court for the Middle District of Georgia

Before RIVES, GOLDBERG and MORGAN, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner-appellant pay to respondent-appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 11, 1971

Issued As Mandate: Apr. 21, 1971

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30081

DEAN RENE PETERS, PETITIONER-APPELLANT

versus

C. P. KIFF, Warden, Macon Prison Branch, Macon County, Ga., RESPONDENT-APPELLEE

Appeal from the United States District Court for the Middle District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Mar. 11, 1971, 5 Cir., 1971, —— F. 2d ——)

(April 13, 1971)

Before RIVES, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

SUPREME COURT OF THE UNITED STATES

No. 71-5078

[Filed, U. S. Court of Appeals, Dec. 6, 1971,
Edward W. Wadsworth, Clerk]

DEAN RENE PETERS, PETITIONER

v.

C. P. KIFF, Warden

ORDER ALLOWING CERTIORARI—Filed November 22, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 453055 396

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5078

DEAN RENE PETERS,

Petitioner,

v.

C. P. KIFF, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

EDWARD T. M. GARLAND
GARLAND & GARLAND
229 Candler Building
Atlanta, Georgia 30303
Attorney for Petitioner

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTIONS PRESENTED FOR REVIEW	4
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	8
ARGUMENT:	
Point I. A White Person Has Standing To Challenge an Indictment Returned by a Grand Jury from Which Negroes Were Systematically Excluded, and Sentence Entered on a Verdict Returned by a Petit Jury from Which Negroes Were Systematically Excluded	9
Point II. The Right of a White Person To Challenge the Grand and Petit Juries from Which Negroes Were Systematically Excluded Is Not a New Rule of Law	20
Point III. Logic and Public Policy Require Retrospective Application of the Right of a White Person To Complain of Systematic Exclusion of Negroes	24
CONCLUSION	28

TABLE OF AUTHORITIES

Cases:

Alderman v. United States, 394 U.S. 165, 89 S. Ct. 961 (1969)	14
Allen v. State, 101 Ga. App. 56 (1964)	15, 23
Anderson v. Georgia, 390 U.S. 206 (1964)	9
Avery v. Georgia, 345 U.S. 559 (1953)	passim
Ballard v. United States, 329 U.S. 187 (1946)	passim
Beck v. Washington, 369 U.S. 541	23

Billingsley v. Clayton, 359 F.2d 13 (C.A. 5, 1966) 10, 11
Brooks v. Beto, 366 F.2d 1 (C.A. 5, 1966) 10, 11
Brown v. Allen, 344 U.S. 443 (1953) 10
Brown v. Board of Education, 347 U.S. 483 (1954) 14
Brown v. State of Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L.Ed. 682 (1936) 21
Bruton v. United States, 391 U.S. 123 (1968) 27, 28
Bumper v. North Carolina, 391 U.S. 543 (1968) 11
Carter v. Green County, 396 U.S. 320 (1970) 16
Carter v. Texas, 177 U.S. 442 (1900) 9
Cash v. Smith, 226 Ga. 318 (1970) 8
Cassell v. Texas, 339 U.S. 282 (1950) 9
Clark v. State, 224 Ga. 966 (1968) 8
Cobb v. Georgia, 389 U.S. 12 (1967) (per curiam) 9
Crooker v. California, 357 U.S. 433 (1958) 26
Delli Paoli v. United States, 352 U.S. 232, 77 S. Ct. 294; 1 L.Ed.2d 278 (1957) 27
Duncan v. Louisiana, 391 U.S. 145 (1968) 17
Escobedo v. Illinois, 378 U.S. 478 26
Eskridge v. Washington State Prison Board, 357 U.S. 214 (1958) 27
Eubanks v. Louisiana, 356 U.S. 584 (1957) 9
Ex Parte Virginia, 100 U.S. 339 (1879) 9, 10
Faye v. New York, 332 U.S. 261 (1947) . . . . . passim
Faye v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L.Ed. 2d 837 (1963) 10, 21
Gibson v. Mississippi, 162 U.S. 565 (1896) 9
Gideon v. Wainwright, 372 U.S. 335 27
Glasser v. United States, 315 U.S. 60 (1942) 10
Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965) 26
Habe v. Kentucky, 303 U.S. 613 (1938) (per curiam) 9

Hill v. Texas, 316 U.S. 400 (1942) 9, 11
James v. Georgia, 389 U.S. 1 (1967) (per curiam) 9
Katz v. United States, 389 U.S. 347 ..... 22, 26
Kotteakos v. United States, 328 U.S. 750 (1946) 12
Labat v. Bennett, 365 F.2d 698 (C.A. 5, 1966) 10, 11
Linkletter v. Walker, 381 U.S. 618 (1965) 20
Mapp v. Ohio, 362 U.S. 643 (1960) 22, 26
Maryland v. Madison, 213 A.2d 880 (1965) 15
Massey v. Smith, 224 Ga. 721 (1968) 8
McDonald v. California, ___ U.S. ___, 10 Cr.L. 4077 (Nov. 22, 1971) 18
McNerlin v. Denno, 378 U.S. 575, 84 S.Ct. 1933, 12 L.Ed.2d 1041 (1964) 27
Michel v. Louisiana, 350 U.S. 91 (1955) 9
Miranda v. Arizona, 384 U.S. 436 26
Mitchell v. State, 225 Ga. 659 (1970) 8
Neal v. Delaware, 103 U.S. 370 (1880) 9
Neal v. Smith, 226 Ga. 96 (1970) 8
Norris v. Alabama, 294 U.S. 587 (1935) 9, 20
Olmstead v. United States, 227 U.S. 438 26
Patton v. Mississippi, 332 U.S. 463 (1947) 9
Peters v. Kiff, 441 F.2d 731 (1971) 6
Peters v. Rutledge, 397 F.2d 731 (1968) 5, 6, 7
Peters v. State, 114 Ga. App. 595 4
Peters v. State, 115 Ga. App. 743 4
Pierre v. Louisiana, 306 U.S. 354 (1939) 9, 20
Pullum v. Greene, 396 F.2d 251 (C.A. 5, 1966) 10, 11
Rabinowitz v. United States, 366 F.2d 34 (1966) 17, 22
Reck v. Pate, 376 U.S. 433 (1961) 21
Reece v. Georgia, 350 U.S. 85 (1955) 9
Roberts v. Russell, 392 U.S. 293, 88 S. Ct. 1921, 20 L.Ed.2d 1100 (1968) 27

Scott v. Walker, 358 F.2d 12 (C.A. 5, 1966) 10

Sims v. Georgia, 389 U.S. 404 (1967) (per curiam) 9

Smith v. Texas, 311 U.S. 128 (1940) . . . . . passim

Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 19 L.Ed.2d 1199 (1967) 24

Strauder v. West Virginia, 100 U.S. 303 (1879) 9, 20

Strauss v. Grimes, 223 Ga. 834 (1967) 5

Sullivan v. Georgia, 390 U.S. 206 (1968) (per curiam) 9

Swain v. Alabama, 380 U.S. 202 (1965) 9

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) 10,15

Tompkins v. State, 138 Ga. 465 (1912) 15

United States v. Lucia, 416 F.2d 920 (C.A. 5, 1969) (affirmed after reconsideration en banc), 423 F.2d 697 (C.A. 5, 1970) 26

Vanleeward v. Rutledge, 369 F.2d 584 (5th Cir. 1966) 7, 22

Virginia v. Rives, 100 U.S. 313 (1879) 9

Whippler v. Dutton, 391 F.2d 425 (C.A. 5, 1968) 22

Whitus v. Balkcom, 370 U.S. 728, 82 S.Ct. 1675, 8 L.Ed.2d 803 22

Whitus v. Georgia, 385 U.S. 545 (1967) . . . . . passim

Williams v. Florida, 399 U.S. 78 (1970) 16, 20

Williams v. Georgia, 349 U.S. 375, 75 S. Ct. 814 (1955) . . 9, 20, 21

Witherspoon v. Illinois, 391 U.S. 510 (1968) 10

Wolf v. Colorado, 338 U.S. 25 (1945) 22, 26

Wong Sun v. United States, 371 U.S. 471 (1963) 14

Constitution and Statutes:

Fourteenth Amendment to the Constitution of the United States 2, 8, 9, 24

Sixth Amendment to the Constitution of the United States 2, 8

United States Code:

18 U.S.C. 243 . . . . . 2, 10, 13

28 U.S.C. 254 1

Georgia Code Annotated:

Sec. 50-127 5

Sec. 59-106 3

Sec. 92-6307 ..... 3, 7

Texts:

Myrdal, *An American Dilemma* (1944) 14

Note, *Negro Defendants and Southern Lawyers: Review in Federal Habeas Corpus of Systematic Exclusion of Negroes from Juries*, 72 Yale L.J. 559 (1963) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5078

DEAN RENE PETERS,

Petitioner,

v.

C. P. KIFF, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

OPINION BELOW

The opinion below is reported at 441 F.2d 371.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1). The judgment of the Fifth Circuit Court of Appeals issued on March 11, 1971 (A. 20). The

petition for rehearing and for rehearing en banc was denied on April 13, 1971. (A. 22) The petition for certiorari was filed in this Court on July 12, 1971. This Court granted certiorari on November 22, 1971. (A. 24)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions:

1. United States Constitution (Amendment VI):

"In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

2. United States Constitution (Amendment XIV, Sec. 1):

". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. Statutory Provisions:

1. Civil Rights Act of March 1, 1875, Sec. 4, 18 Stat. 336-337, now 18 U.S.C. 243:

"AN ACT TO PROTECT ALL CITIZENS IN THEIR CIVIL AND LEGAL RIGHTS

"Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore . . .

* * * * *

"Sec. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any

State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars."

2. Georgia Code Annotated, Title 59, Sec. 106:

"Revision of jury lists. Selection of grand and traverse jurors.—Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall revise the jury lists.

"The jury commissioners shall select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these the most experienced, intelligent, and upright citizens to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

3. Georgia Code Annotated, Title 92, Sec. 6307:

"Entry on digest of names of colored persons.—The tax receivers shall place the names of the colored taxpayers, in each militia district of the county, upon the tax digest in alphabetical order. Names of colored and white taxpayers shall be made out separately on the tax digest.

"(NOTE: Georgia Laws 1966, page 393, effective March 10, 1966, repealed the above and foregoing section. However no revision of the jury lists was made subsequent to the effective date of the repealer

and prior to the second trial of appellant, and no revision of the jury list could have been made subsequent to the effective date of the repealer and prior to August of 1966, under the provisions of Section 59-106, Georgia Code Annotated)."

QUESTIONS PRESENTED FOR REVIEW

1. Does a white person have standing to challenge (a) an indictment returned by a grand jury from which negroes were systematically excluded, and (b) a sentence entered on a verdict returned by a petit jury from which negroes were systematically excluded?

2. Assuming that a white person has a right to challenge the grand and petit juries from which negroes were systematically excluded (a) is this a new rule of law as to which there is a question of retroactivity, and (b) if this right of a white person is a new rule of law, does logic and public policy require retrospective application of this rule?

STATEMENT OF THE CASE

The petitioner was indicted for the offense of burglary by the Grand Jury of Muscogee County, Georgia, on June 6, 1966, in Indictment No. 24-927. (A. 9) Shortly thereafter petitioner was tried and convicted. Petitioner appealed his original conviction on the charge of burglary to the Court of Appeals of Georgia, and his original burglary conviction was reversed and remanded for re-trial. *Peters v. State,* 114 Ga. App. 595. Upon re-trial on the same indictment, petitioner was re-convicted on December 8, 1966, with a sentence of ten years. (A. 10) This conviction was appealed to the Court of Appeals of Georgia, and the conviction was affirmed. *Peters v. State,* 115 Ga. App. 743. A motion for re-hearing was denied by the Court of Appeals of Georgia. On June 12, 1967, petitioner filed his first Federal habeas corpus petition in the United States District Court for the Middle District of Georgia, Columbus Division.

In his petition, he asserted, among other grounds:

1. Systematic exclusion of negroes from the grand and traverse (petit) juries by which he was indicted and tried.

2. Exclusion of all non-property owners from the grand and traverse juries.

The District Court dismissed without granting an evidentiary hearing. *Peters v. Rutledge,* 397 F.2d 731 (1968).

Appeal was then taken to the United States Court of Appeals for the Fifth Circuit. On June 6, 1968, the Fifth Circuit affirmed partly on the merits as to the search and seizure claim and partly for failure of petitioner to exhaust his State remedies. *Peters v. Rutledge, supra,* p. 741, in light of Georgia's habeas corpus act of 1967, Ga. Laws 1967, p. 835, Ga. Code Ann. Sec. 50-127. On November 22, 1967, the Supreme Court of Georgia in *Strauss v. Grimes,* 223 Ga. 834 (1967), held that judicial review of jury discrimination is foreclosed when the accused offered no objection to the composition of the jury venire during the trial and the conviction occurred prior to the decision in *Whitus v. Georgia,* 385 U.S. 545 (1967). This rule of the Supreme Court of Georgia made resort to the Georgia courts unnecessary. Petitioner therefore had no available State remedy to exhaust and on March 16, 1970, filed his second petition for Federal habeas corpus in the United States District Court for the Middle District of Georgia asserting as the sole grounds for relief:

> 1. Systematic exclusion of negroes from the grand and traverse (petit) juries by which he was indicted and tried.
>
> 2. Exclusion of all non-property owners from the grand and traverse juries.

The District Court on April 22, 1970, again dismissed the petition without an evidentiary hearing (A. 15). The reasons given for dismissal as stated in the order were:

(1) That the merits of substantially the same issues here raised were determined adversely to Petitioner by virtue of the order and judgment of this Court entered in Civil Action No. 1233, in the Columbus Division, on July 5, 1967, and affirmed by the United States Court of Appeals for the Fifth Circuit on June 6, 1968. *Peters v. Rutledge*, 397 F.2d 731.

(2) That the Petitioner has failed to exhaust his available state remedies.

(3) That the petition fails to set forth a cause of action upon which relief can be granted.

Appeal was then taken to the Fifth Circuit Court of Appeals. On March 11; 1971, the Fifth Circuit affirmed the dismissal. *Peters v. Kiff*, 441 F.2d 731 (1971). In its ruling, the Fifth Circuit held that return to State Court by petitioner was not required because he had no available State remedies. *Peters v. Kiff, supra.* The petition for rehearing in the Fifth Circuit was denied on April 13, 1971.

This ruling of the Fifth Circuit dealt directly with reason No. 2 of the District Court's order on the question of exhaustion of State remedies. Reason No. 1 for dismissal in the District Court's order stated that:

> ". . . merits of substantially the same issues were determined adversely to petitioner." (A. 15)

Both habeas corpus petitions having been dismissed without an evidentiary hearing, no determination on the "merits" has ever occurred. *Peters v. Rutledge, supra; Peters v. Kiff, supra.*

This dismissal by the District Court and affirmance by the Circuit Court constituted a determination that the petitioner, a white man, could not state a cause of action upon which relief could be granted by proof of systematic exclusion of negroes from the grand and traverse juries. This was reason No. 3 in the District Court's order of dismissal. (A. 15)

On December 6, 1966, the Fifth Circuit in *Vanleeward v. Rutledge,* 369 F.2d 584 at 587 (5th Cir. 1966) held that the traverse jury list in Muscogee County "as made up, was so heavily weighted against the possibility of inclusion of negroes of the member race in any traverse panel as to cause it to fall within the condemnation of the decided cases." In *Vanleeward,* the traverse jury list was made up by selection from the Tax Digest. Fourteen percent of those listed on the Tax Digest were negro and eighty-six percent were white. The names of white taxpayers were kept on white sheets and the names of negro taxpayers were kept on yellow sheets. Although the grand and traverse juries which indicted and convicted petitioner were not selected from the same jury box that Vanleeward's grand jury was selected from, the jury box was being filled in the same discriminatory manner in accordance with the provisions of Ga. Code Ann. Sec. 92-6307 which required that tax digests be segregated according to race. This law was deleted from Georgia law on January 1, 1967. The law requiring traverse juries to be chosen from registered voter lists instead of the tax digest did not become effective until March 30, 1967. *Peters v. Rutledge, supra,* at 739. At p. 740 of that opinion, the Fifth Circuit stated:

> "One of the matters which the Georgia Courts may well necessarily have to consider initially is the extent to which our holding in *Vanleeward v. Rutledge, supra,* will operate either as a sort of *in rem* finding of fact on demonstrable historical facts which cannot likely vary, or at least as stare decisis with respect to the method of jury selection in Muscogee County and whether without further evidential proof that this method resulted in unconstitutionally constructed juries. Since Appellant's trial began one day after the decision in *Vanleeward,* but several months before effective changes were made in the method of jury selection, the Georgia courts may well determine that it is not necessary to prove again all the same facts and statistics that led this Court to reach the result that it did in *Vanleeward.*

> In these days of exploding dockets, every consideration points toward an avoidance of this waste of judicial energy."

The holding in *Vanleeward* should have been held to establish an *in rem* finding of fact; however, petitioner under the laws of Georgia was unable to raise for consideration such an issue in the State courts because of Georgia's rule that a white person may not complain of the systematic exclusion of negroes from the juries by which he was indicted and tried.[1]

SUMMARY OF ARGUMENT

The Sixth Amendment to the Constitution of the United States provides for the right to trial by jury. This right means a jury constituting a body truly representative of a cross-section of the community. In addition, Congress declared in Section 4 of the Civil Rights Act of 1875 that exclusion of citizens from service upon the jury because of race was illegal. The due process and equal protection of law provisions of the Fourteenth Amendment to the Constitution of the United States require that all State juries be a body truly representative of the community. A jury is not truly representative of the community and is illegally constituted if there has occurred a systematic exclusion of an identifiable class on the basis of race. If a racial exclusion of identifiable class has occurred, a criminal defendant is denied due process and equal protection of the law. The right of a defendant to complain of such a denial is not dependent upon a showing of factual prejudice but exists as a fact because he has not been tried in accordance with the law. An accused, irrespective of his race, cannot be indicted before a grand jury or tried before a traverse petit

---

[1] *Cash v. Smith*, 226 Ga. 318 (1970); *Neal v. Smith*, 226 Ga. 96 (1970); *Massey v. Smith*, 224 Ga. 721 (1968); *Mitchell v. State*, 225 Ga. 656 (1967); *Clark v. State*, 224 Ga. 966 (1968).

jury which was illegally impaneled by the systematic exclusion of an identifiable class on the basis of race.

Petitioner, a white man, therefore can complain of the exclusion of negroes from the grand and traverse juries by which he was indicted and tried.

ARGUMENT

POINT I

A WHITE PERSON HAS STANDING TO CHALLENGE AN INDICTMENT RETURNED BY A GRAND JURY FROM WHICH NEGROES WERE SYSTEMATICALLY EXCLUDED, AND SENTENCE ENTERED ON A VERDICT RETURNED BY A PETIT JURY FROM WHICH NEGROES WERE SYSTEMATICALLY EXCLUDED.

The practice of excluding Negroes from state grand and petit juries has, since 1879, been consistently condemned by the Supreme Court as a violation of the Fourteenth Amendment.[2] As articulated in *Gibson v. Mississippi*, 162 U.S. 565, 580 (1896), a state may not, consistent with the provisions of the Fourteenth Amendment, deny to Negroes, because of their color, "the right or privilege accorded to

---

[2] *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Virginia v. Rives*, 100 U.S. 313 (1879); *Ex parte Virginia*, 100 U.S. 339 (1879); *Neal v. Delaware*, 103 U.S. 370 (1880); *Carter v. Texas*, 177 U.S. 442 (1900); *Norris v. Alabama*, 294 U.S. 587 (1935); *Habe v. Kentucky*, 303 U.S. 613 (1938) (per curiam); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Smith v. Texas*, 311 U.S. 128 (1940); *Hill v. Texas*, 316 U.S. 400 (1942); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Cassell v. Texas*, 339 U.S. 282 (1950); *Avery v. Georgia*, 345 U.S. 559 (1953); *Williams v. Georgia*, 349 U.S. 375 (1955); *Reece v. Georgia*, 350 U.S. 85 (1955); *Michel v. Louisiana*, 350 U.S. 91 (1955); *Eubanks v. Louisiana*, 356 U.S. 584 (1957); *Swain v. Alabama*, 380 U.S. 202 (1965); *Whitus v. Georgia*, 385 U.S. 545 (1967); *Cobb v. Georgia*, 389 U.S. 12 (1967) (per curiam); *James v. Georgia*, 389 U.S. 1 (1967) (per curiam); *Sims v. Georgia*, 389 U.S. 404 (1967) (per curiam); *Anderson v. Georgia*, 390 U.S. 206 (1968) (per curiam); *Sullivan v. Georgia*, 390 U.S. 206 (1968) (per curiam).

white citizens of participating as jurors in the administration of justice."

Even before the Supreme Court had spoken on the matter, the Congress had declared, in Section 4 of the Civil Rights Act of March 1, 1875, 18 Stat. 336-337, now 18 U.S.C. 243, that, "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude . . ." That statute, enacted pursuant to the authority found in Section 5 of the Fourteenth Amendment for the Congress to enforce the constitutional proscriptions by appropriate legislation, was upheld as fully consistent with the provisions of the Amendment in *Ex parte Virginia, supra.*

Thus, it is clear beyond conjecture, that when the Muscogee County jury commissioners systematically excluded Negroes from the grand and traverse (petit) jury, they were acting in direct contravention of federal constitutional and statutory commands. And, as purposeful racial exclusions lead to "presumptive constitutional violations," a tribunal set up in defiance of those commands "is an unlawful one whether . . . [a court] think[s] it unfair or not." *Faye v. New York,* 332 U.S. 261, 292-293 (1947).

Furthermore, both the Supreme Court and this court have recognized that, "it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith v. Texas,* 311 U.S. 128, 130 (1940).[3] Whereas it is

[3] *Glasser v. United States,* 315 U.S. 60, 85 (1942); *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 220 (1946); *Ballard v. United States,* 329 U.S. 187, 191 (1946); *Fay v. New York,* 332 U.S. 261, 299-300 (1947) (Murphy, J., dissenting); *Brown v. Allen,* 344 U.S. 443, 474 (1953); *Witherspoon v. Illinois,* 391 U.S. 510, 524, 530-32 (1968) (Douglas, J., concurring); *Scott v. Walker,* 358 F.2d 13, 19 (C.A. 5, 1966); *Labat v. Bennett,* 365 F.2d 698, 712, 719-20 (C.A. 5, 1966); *Brooks v. Beto,* 366 F.2d 1, 11-14 (C.A. 5, 1966); *Pullum v. Greene,* 396 F.2d 251, 255-57 (C.A. 5, 1968); *Billingsley v. Clayton,* 359 F. 2d 13 (C.A. 5, 1966).

not clear which classes or groups a state may purposefully exclude and still comply with its constitutional obligations to a defendant, see, e.g., *Faye v. New York, supra*; and *Rumper v. North Carolina*, 391 U.S. 543 (1968), it is clear that the purposeful exclusion of Negroes deprives the jury, in the constitutional sense, of its representative character.[4]

The grand jury which indicted petitioner was illegally constituted because of the systematic exclusion of Negroes. The Supreme Court recognized in *Faye v. New York, supra*, that racial exclusions from state juries enjoy the unique status of clear and unambiguous federal constitutional and statutory condemnation. The Supreme Court has recognized that in cases where indictments have been returned by grand juries consituted in violation of these federal provisions prejudice to a defendant is presumed from the fact that the jury was constituted in violation of federal law, *id.*, at 292-293. As the Court explained in *Hill v. Texas, supra*,

> "* * * [N]o State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. * * * [I]t is our duty as well as the State's to see to it that throughout the procedure for bringing him [defendant] to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, * * * [defendant] has laid bare a [racial] discrimination in the selection of grand jurors, the conviction cannot stand because the Constitution prohibits the procedure by which it was obtained. Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, *the benefits of which every person may demand*." 316 U.S. 400, at 406 (emphasis supplied).

We recognize that the Supreme Court has articulated the aforementioned presumption of prejudice rule in cases in

---

[4] E.g., *Billingsley v. Clayton*, supra; *Labat v. Bennett*, supra, *Brooks v. Beto*, supra; *Pullum v. Green*, supra.

which the defendant was a member of the excluded class. However, in the context of federal jury selection, in *Ballard v. United States, supra,* the Court did have occasion to consider the question of whether a male had standing to complain about the systematic exclusion of females from the grand and petit juries which indicted and convicted him. Ignoring the lack of identity with the excluded class, the Court held that petitioners (a mother and son) had standing to raise the exclusion issue and, since the exclusion was admitted, ordered the indictments quashed.

At the time of the *Ballard* decision, the applicable federal statute provided that jurors in a federal court should possess the same qualifications as required in the state in which the federal court was located. The *Ballard* district court was located in a state where women were eligible for jury service. Nevertheless, by local state practice, women were excluded from jury service, and the federal court followed local practice and likewise excluded women.

The Court began its analysis by pointing out that neither the federal statute nor the state jury qualification statute exempted women. It concluded that "The system of jury selection which Congress has adopted contemplated, therefore, that juries in the federal courts sitting in such States should be representative of both sexes." *Id.*, at 191. Thus, the exclusion of women did "not accord to the defendant the type of jury to which the law entitled him. It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him." *Id.*, at 187, quoting from *Kotteakos v. United States,* 328 U.S. 750 (1946).

The relevance of *Ballard* to the present case is that it identifies an interest which individuals, not members of the excluded class, have at stake in the composition of the grand jury. A defendant, in order to assert his interest, need not show that the particular exclusion harmed him in some special way; he need not show that the outcome would have been, or is, likely to have been different if the class had not

been excluded, for "reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection." 329 U.S. at 195.

Here, there is also a federal statutory declaration that Negroes may not be excluded from the grand jury, 18 U.S.C. 243; in addition, the excluded class is assuredly less interchangeable with the included than was the case in *Ballard*. Petitioner herein is equally well able to claim therefore, that he was denied the type of jury to which the law entitles him and that the absence of the excluded class deprived the jury of an element of the community for which there could be no substitute.

While in *Ballard* the Court was acting pursuant to its supervisory powers over the federal courts, no reason exists why the Court's rule on standing, based as it was upon federal statutory rights, should not also apply in cases where the challenge is made to the selection of state jurors. Here standing is also based on a federal statute (declarative of constitutional principles) and absent some rule of independent constitutional dimension which isolates the state procedures from attack by a defendant moving under a federal law and possessing all the attributes found sufficient in *Ballard* to give such person standing to challenge an exclusion from the grand jury, this court should take cognizance of the attack here made.

No reason in law or policy exists for constructing different rules of standing to challenge the selection of state or federal juries, especially when racial exclusion is alleged. Clearly the state has no interest at stake which is worthy of stringent protection—the Muscogee County grand jury and traverse (petit) jury was clearly an illegally constituted body. And, furthermore, state officials have been under a clear constitutional and statutory duty not to discriminate against Negroes in the selection of jurors for close to one

hundred years. On the other hand, it is in the interest of society that compliance with federal law be enforced.[5]

Racial exclusions from jury service enjoy a unique status in the criminal law. Whereas, on the other hand, for example, only a defendant who can demonstrate the invasion of his personal constitutional privilege against unlawful search and seizure may invoke the exclusionary rule, see, e.g., *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961 (1969), and *Wong Sun v. United States*, 371 U.S. 471 (1963), when systematic racial discrimination is alleged the Supreme Court has indicated that the courts should presume the requisite injury from the very fact of the exclusion, *Fay v. New York, supra*, at 292-293.

By constitutional and statutory declaration Negroes are required to be included, equally with white persons, in the administration of justice by serving on grand and petit juries. Those explicit commands embody, we believe, a judgment that as the Negro is an integral part of the community in which he lives, his systematic exclusion from the jury rolls

---

[5]Holding that a white person cannot complain raises an issue identical to the question presented by other state-imposed racial classifications: Is separate equal? For the logical result of these decisions is two racially separate systems of justice.

A prototype of separate but equal justice is already found in our history. In many communities, both North and South, law enforcement officers have regarded crimes committed by Negroes against Negroes as being different from interracial crimes or crimes involving two whites. There was a tacit, but official, attitude that permitted conflicts between Negroes to seek their own solution. See, *G. Myrdal, An American Dilemma*, 542, 969, 1336 n. 4 (1944). In nullifying the separate-but-equal doctrine with respect to racial segregation of schools, the Supreme Court emphasized the importance of ensuring that all persons are able to participate in the rights and duties of citizenship. See, *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Providing an equal opportunity for all persons to exercise those rights and fulfill those duties within the context of a unitary judicial system is at stake here and is of paramount importance to the community at large.

would be not only inconsistent with his obligations of citizenship but also that a jury drawn from such a list would be an unfair as well as unlawful body. As such, it should make no difference whether the defendant asserting the unfairness of the jury by reason of purposeful racial discrimination is a black or a white person. Petitioner perceives no reason why, in the face of the constitutional and statutory provisions, the courts should engage in an attempt to isolate degrees, if any,[6] of prejudice.

Georgia has long recognized prejudice resulting from failure to lawfully impanel or swear jurors. In *Tomkins v. State*, 138 Ga. 465, 467 (1912), the Supreme Court of Georgia said:

> "Grand jurors who have not been lawfully impaneled or sworn have no more authority to find indictments than the same number of citizens outside of the courthouse—they are not a grand jury in law."

The denial of the constitutional right to a jury which is a representative cross-section is an injury to the defendant. As said in *Allen v. The State*, 101 Ga. App. 56 (1964), p. 67,[7] "When an irregularity in criminal proceedings involving the constitutional rights of the defendant is shown, it is per se injurious to the defendant."[8]

---

[6]Cf. Note, *Negro Defendants and Southern Lawyers; Review in Federal Habeas Corpus of Systematic Exclusion of Negroes from Juries*, 72 Yale L.J. 559 (1963), especially at 565 n. 25, 567-568 and n. 33, 569 n. 41.

[7]The issue in *Allen* was the same as is presented by petitioner here. Judge Hall in that well reasoned opinion found the prior holding of this Court to require that a white man be accorded the same right to complain as is accorded to a Negro. Had the Supreme Court of Georgia followed this opinion, petitioner would, of course, not be before this Court.

[8]*Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946); *Maryland v. Madison*, 213 A.2d 880 (1965) in which defendant who was not a member of the class unconstitutionally excluded was held to have standing to complain because grand jurors were required to show

The State of Georgia chose to provide the petitioner with a grand and petit jury. Having done so, Georgia had the duty to ". . . hew to the Federal constitutional criteria in insuring that the selection of membership is free of racial bias." *Carter v. Green County*, 396 U.S. 320, 330 (1970).

That black and white are entitled to equal treatment under the law is a fundamental proposition of our legal system. Black and white in legal theory have the same legal status. They live in the same communities, work at the same jobs, buy merchandise from the same stores, educate their children at the same schools, use the same public facilities and abide by the same local laws. In short, they comprise the community. The conclusion is therefore apparent —that if a jury is to contain a representative cross-section, it must contain both black and white. In *Carter v. Green County, supra*, p. 330, this Court, citing *Smith v. Texas, supra*, again reemphasized the meaning in a constitutional sense of a jury, to be

> "A body truly representative of the community, composed of peers or equals of the persons whose rights it is selected or summoned to determine; that is of his neighbors, fellows, associates, persons having the same *legal* status in society which he holds". (Emphasis supplied.)

If a jury, to be representative of the community, must have included those having the same *legal status*, then a white defendant in order to have a jury which is a body truly representative of the community must have included blacks. As stated in *Williams v. Florida*, 339 U.S. 78, p. 100 (1970),

> "The purpose of a jury trial, as we noted in *Duncan*, is to prevent oppression by the government. 'Providing an accused with the right to be tried by a jury of his

---

their belief in the existence of God even though the defendant himself professed a belief in the existence of a Supreme Being. At p. 882, the Supreme Court of Maryland stated the basis for this decision: "Every person accused of crime has the right to be tried under what has been determined to be the law of the land."

> peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased or eccentrial judge.' *Duncan v. Louisiana*, 391 U.S. 145 at 156 (1968). Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accusor of the common sense judgment of a group of laymen in a community participation and shared responsibility that results from that group's determination of guilt or innocense."

All black and white citizens should be held to have an equal right of inclusion of the other upon the jury so that it may be a body truly representative of the community. If a negro has the right to have negroes included, then equal protection requires that a white have the right to have negroes included. Absent such a holding, our law would at most provide that whites are constitutionally entitled only to justice administered by whites and that blacks are constitutionally only entitled to justice administered by blacks. This in turn would logically lead to sanctioning all white juries for the trial of whites and all black juries for the trials of blacks. To sanction such logic as law would illustrate the danger of compromising the requirement of the representative cross-section pointed out in *Rabinowitz v. United States*, 366 F.2d 34, 45 (1966), citing *Smith v. Texas, supra*, at p. 45.

> "Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by representative groups are undermining processes, weakening the institution of jury trial and should be sturdily resisted. That the motives influencing such tendencies may be the best, must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties."

When the representative character of the jury is destroyed, there is prejudice regardless of the color or racial mixture

of the defendant. Trial experience in criminal cases teaches the uncertainty of the attitudes of jurors in relation to race.[9] A negro juror may have attitudes favoring a white defendant, if the white defendant has negro witnesses in his defense, or white witnesses against him. On the other hand, a negro juror may have attitudes favoring the white defendant in preference to the testimony of white law enforcement officers. The wisest of trial lawyers does little more than act on conjecture and speculation in striking a jury as to the effect of racial identity as it relates to a particular case. No one, however omniscient, knows the effect of the attitudes, prejudices, and personal experiences operating in the minds of the particular jurors.

In recognition of this fact, the Constitutional standard of selecting the jury, both Grand and Petit, from a representative cross section of the community was established. Such a standard to have validity must be color-blind.[10] Surely, it must mean that all defendants are entitled to have selected jurors possessing the representative attitudes, prejudices and thought patterns of the community. The essence of what is selected when a juror is selected, is his or her unique set of mental processes and attitudes with respect to the litigation to be analyzed.

---

[9] "We can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof. It may be absent in one case and present in another; it may gradually and silently erode the jury system before it becomes evident. But it is no less real or meaningful for our purposes. If the constitutional right to a jury impartially drawn from a cross-section of the community has been violated, we should vindicate that right, even though the effect of the violation has not yet put in a tangible appearance. Otherwise that right may be irretrievably lost in a welter of evidentiary rules."

[10] As Justice Douglas said in dissent in *McDonald v. California*, ___ U.S. ___; 10 Cr.L. 4077 (Nov. 22, 1971), "We would all agree that the brand of justice received in our courts should not depend upon the color of one's skin and that the selection of jury panels should not be tainted by the exclusion of racial groups."

The color of the skin does not vote in the jury box—the mind of the juror does, as it may be affected by the multiple uncertainties of thought patterns, attitudes, prejudices and personal experiences which combine with the facts of the case and then mix with the attitudes of fellow jurors, producing the vote of the jury.

No one knows what effect the attitude of a black militant, a black civil rights worker, a black minister of the Baptist faith, a black school teacher, a black housewife or a black businessman or other members of the black community would have on the verdict of a jury when mixed with the attitudes of the other jurors and the facts of the particular case as they relate to a particular *white* defendant.[11]

Either all citizens have the right to have a jury drawn from a representative cross-section of the community free of racial bias or none have the right. The due process and equal protection of the law provisions of the Fourteenth Amendment should be declared to require State juries to be a body truly representative of the community available to all citizens without regard to the color of the skin.

---

[11]What Justice Douglas said in *Ballard v. United States, supra*, in discussing the effect of the exclusion of women applies equally here in dealing with the white-black exclusion: "The subtle interplay of influence one on the other is among the imponderables . . . . Yet a flavor, a distinct quality is lost if either . . . is excluded." *Ballard v. United States, supra* at 193.

POINT II

THE RIGHT OF A WHITE PERSON TO CHALLENGE THE GRAND AND PETIT JURIES FROM WHICH NEGROES WERE SYSTEMATICALLY EXCLUDED IS NOT A NEW RULE OF LAW.

A defendant's right to a jury impartially drawn from a cross-section of the community has existed since the right of trial by jury was provided for in the United States Constitution.[12]

In *Whitus v. Georgia, supra,* this court did not "change" existing law or overrule any precedent, but was only a continued application of decades of authority. Indeed, as this Court so carefully pointed out in *Whitus, supra,* discrimination against Negroes, or any other class of persons, in the selection of state juries, has been held violative of the Fourteenth Amendment since 1879, in *Strauder v. West Virginia,* 100 U.S. 303, 25 L.Ed. 664; and the principle has been several times reiterated, *Norris v. Alabama,* 294 U.S. 587, 55 S. Ct. 579, 79 L.Ed. 1074 (1935); *Pierre v. Louisiana,* 306 U.S. 354, 59 S. Ct. 536 (1939). Further, the Court found that the circumstances struck down in *Whitus* were "akin" to those condemned in *Avery v. Georgia,* 345 U.S. 559, 73 S.Ct. 891 (1953). Subsequently, in *Williams v. Georgia,* 349 U.S. 375, 75 S.Ct. 814 (1955), this Court made clear that what it was condemning in *Avery* was the "system of selection" and not any particular method by which it was carried out.

Thus considered, it is plain that *Whitus* made no change in law enforcement procedures or established any "new" line of authority, but was merely a case of applying time-honored and established principles to discriminatory techniques which had become slightly more covert. The Court's opinion in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731

[12] *Smith v. Texas, supra,* p. 130.
Williams v. Florida, 399 U.S. 78, 93, n. 35 (1970).

(1965) in fact, show, by its distinguishing of other cases, that no concept of "retroactivity" is involved in circumstances such as those in the case at bar:

> "It is urged, however, that these same considerations apply in the cases that we have applied retrospectively in other areas, notably that of coerced confessions, and that the Mapp exclusionary rule should, therefore, be given the same dignity and effect. Two cases are cited, *Faye v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), and *Reck v. Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed. 2d 948 (1961), but neither is apposite. It is said that we ordered new trials 25 years after conviction in the latter and after the lapse of 21 years in the former. This time table is true but that is all. The principle that a coerced confession is not admissible in a trial predated the arrests as well as the original convictions in each of these cases. See *Brown v. State of Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936). *There was no question of retrospective operation involved in either case.*" (Emphasis supplied)

At least eleven years before *Whitus*, the states in general and Georgia in particular, had been told that any trick, device, or arrangement of colored papers which had the effect of deliberate exclusion of a segment of the population from criminal juries was constitutionally intolerable, *Avery v. Georgia*, *supra*, and *Williams v. Georgia*, *supra*. To hold the *Whitus* decision inapplicable to the case at bar because of a concept of "retroactivity" would not only distort the useful principles of retrospective vs. prospective application, but would also encourage any state officials, who were so inclined, to engage in an interminable hare-and-hounds contest with the federal courts.

It is obvious that the subtleties which may be employed to bring about the *result* of purposeful exclusion are as infinite as human imagination. If the reasoning urged by the State of Georgia in these two cases were to be approved by the courts, the important principle in *Whitus v. Georgia, supra,* would be whittled away to an intolerably narrow factual base, and a premium would be placed upon the ingenuity of the various evasions which might be devised by state officials inclined to perpetuate the old abuses.

We submit that this danger alone removes the question of prospective vs. retrospective, notwithstanding the state authorities' assurance that the method of jury selection has been changed. It was changed after *Avery* in 1952, but the old abuses continued. Viability can be given to the *Whitus* principle only by striking down convictions which resulted from discredited practices.

The system about which *Whitus* was complaining in his original habeas corpus was the same system about which the petitioner is now complaining. Completely apart from *Whitus, Avery* and *Williams,* would have been an adequate reason for granting of the writ and correction of the abuse. This is proved by the fact that the Fifth Circuit's grant of habeas corpus on account of jury discrimination in *Vanleedward v. Rutledge,* 369 F.2d 584 (CA 5, 1966) occurred *prior* to *Whitus.*

It is most likely that it was these precedents that this Court had in mind at the time of its per curiam reversal in *Whitus v. Balkcom,* 370 U.S. 728, 82 S. Ct. 1675, 8 L.Ed. 2d 803. See also, *Whippler v. Dutton,* 391 F.2d 425 (CA 5, 1968), wherein the Fifth Circuit apparently assumed the non-existence of any retroactivity question.

Arguments opposed to this view would contend that both *Whitus* and the result which petitioner is now seeking, would constitute a "new" rule of law in the same sense as cases such as *Mapp v. Ohio,* 362 U.S. 643 (1960, which expressly overruled *Wolf v. Colorado,* 338 U.S. 25 (1945), or *Katz v. United States,* 389 U.S. 347, which expressly overruled long standing

lines of authority holding that law enforcement officials were free to eavesdrop without physical tresspassing.

The rule of law which petitioner is urging here was logically established, at least as early as 1946, as stated in *Ballard v. United States, supra,*[13] "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." *Faye v. New York, supra,* is not in conflict with this principal for in *Faye* the court, at p. 287, said, "Nevertheless, we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well established case under the Amendment."

Indeed, the exact rule which the petitioner urges was squarely stated by the Fifth Circuit in *Rabinowitz v. United States, supra,* where, in referring to the standing of a white person in Federal Court to challenge the exclusion of Negroes from juries, that Court said:

> "Indeed, a departure from the statutory scheme, which 'deprives the jury system of the broad base it was designed by Congress to have in our democratic society' may be asserted by any litigant, even though he is not a member of the excluded class." 366 F.2d 34, 37.

Not only was the right of a white person recognized to exist in the Fifth Circuit at the time of petitioner's trial but Georgia Court of Appeals in *Allen v. State, supra,* had held that such a right in fact existed in Georgia.[14] However, the Supreme Court of Georgia refused to follow the *Allen* case.

[13] *Ballard v. United States, supra,* p. 195 (1946).

[14] *Allen v. State, supra,* citing *Faye v. New York, supra,* and *Beck v. Washington,* 369 U.S. 541, in which the Court of Appeals of Georgia said,

> "We are of the opinion that any system that results in the consistent selection of jurors from a group or portion only of those available for service in that office rather than from those available without discrimination, does not accord to any defendant the type of jury to which the law entitles him.

POINT III

LOGIC AND PUBLIC POLICY REQUIRE RETROSPECTIVE APPLICATION OF THE RIGHT OF A WHITE PERSON TO COMPLAIN OF SYSTEMATIC EXCLUSION OF NEGROES

Retrospective application of the right of a white person to complain is warranted by the standards found in prior decisions of this court.

In *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 19 L. Ed. 2d 1199 (1967), this court held the new rules as to "line-up" identification were not to be applicable to earlier cases. In so deciding, the Court set forth the guidelines to be applied in determining the manner of application of a new rule:

> "* * * 'These cases establish the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective * * * where the exigencies of the situation require such an application" * * *.' *Johnson, supra*, 384 U.S., at 726-727, 86 S.Ct., at 1777. The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) *the extent of the reliance by law enforcement authorities on the old standards*, and (c) the effect on the administration of justice of a retroactive application of the new standards. '[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provisions of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background or precedent, and its own impact on the administration of justice, and the way in which these factors combine must

---

'The equal protection clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community.'"

inevitably vary with the dictate involved.'" 87 S.Ct. at 1969-1970. (Emphasis supplied).

Petitioner denies that *Whitus* presented any "new" rule within the meaning of this language. Even, however, if it be considered a new standard, petitioner urges that the application of the Court's criteria above cited would require that the general principle of retrospective interpretation be followed.

With respect to criterion (a), the purpose of the *Whitus* rule is to correct what the Court characterized as "the evil" (385 U.S. 545, 552) resulting from a "system of selection" which arbitrarily discriminated against a race or class of people. It seems to petitioner, therefore, that the purpose of *Whitus* (and the cases following it) was to place once and for all the Supreme Court's stamp of disapproval upon any method of jury selection which *resulted* in the exclusion of any eligible segment of the population from juries, or produced juries which were less than a fair cross-section of the community.

If *Whitus* is narrowed to a prospective application to the particular method there invovled, the purpose might well be thwarted. The prosecuting authorities might well devise new methods which would accomplish the old result, secure in the knowledge that prosecutions gained by such methods would be undisturbed.

Criterion (b)—the extent of reliance by the authorities on the old standards—requires no elaborate argument. Petitioner knows of no decision by the Supreme Court, or any other court, which—at least for the last fifteen years—could have lead the Georgia authorities to believe that they were justified in discriminating against Negroes, or any other segment of the population, in the selection of any grand or petit jury, no matter who was being tried. Indeed, every indication that the Supreme Court gave, and especially *Avery* and *Williams*, should have compelled the opposite conclusion. No constitutional authority *ever* told the officials of Georgia that they could purposefully exclude Negroes or include them only in token numbers.

This concept is sharply to be distinguished from the *Mapp v. Ohio, supra,* and *Wolf v. Colorado, supra,* situation; prosecuting authorities would certainly have been entitled to rely on *Wolf.* Also, *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), struck down the statutory privilege of commenting on the failure of the accused to testify—which had not theretofore been challenged. The same is true as to *Katz v. United States, supra,* which overruled *Olmstead v. United States,* 227 U.S. 438.

It is certainly reasonable to assume that law enforcement authorities would have, for decades, relied on *Olmstead,* and in this light, the *holding* of *Desist* would be logically expected.

Escobedo and *Miranda,*[15] impliedly overruled *Crooker v. California,* 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed. 2d 1448 (1958), upon which law enforcement officials were justifiably entitled to reply.

Finally, there is criterion (c)—the "effect on the administration of justice". We do not think that this standard refers to the expressed fears of a mass legalized jailbreak. We think that the Supreme Court had in mind the right of prosecuting authorities to rely upon apparently valid procedures considered in connection with any inherent unreliability in the discredited procedure.

Eavesdropping evidence, and line-up evidence, for example, have no "inherent unreliability", but depend upon other constitutional or policy considerations. A biased grand jury, or petit jury, however (biased because of an unlawful exclusion of a portion of the population) is inherently unreliable and has long been so recognized.

The correctness of retrospective application is shown by the Fifth Circuit's opinion in *United States v. Lucia,* 416 F.2d 920 (CA 5, 1969) (affirmed after reconsideration *en banc,* 423 F.2d 697 (CA 5, 1970), in which the Court said:

---

[15] *Miranda v. Arizona,* 384 U.S. 436.
Escobedo v. Illinois, 378 U.S. 478.

> "In contrast, new constitutional rules going to the fundamental fairness of a trial, the accuracy and reliability of the fact-finding process, rules that substantially reduce the likelihood that an innocent person will be convicted, have received retroactive application. For example, in *Bruton v. United States* 1968, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 overturning *Delli Paoli v. United States*, 1957, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed. 2d 278, the Court held that the admission of a defendant's extra-judicial confession implicating a co-defendant violates the co-defendant's right to confront his accuser under the Sixth Amendment. In *Roberts v. Russell*, 1968, 392 U.S. 293, 295, 88 S. Ct. 1921, 1922, 20 L. Ed. 2d 1100, 1103, the Court held that '[this] constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined.' The purpose of the new *Bruton* rule, greater accuracy in guilt-determination, applied to past as well as future trials, and the Court therefore extended *Bruton* retroactively."— 416 F.2d 920, at 925.

Also there would be an anomalous "effect on the administration of justice" of a rule which would free black people, but leave whites in prison. This approach would still allow extensive habeas corpus litigation, while setting a constitutionally impermissible reverse double standard for white and black prisoners.

Whether or not petitioner was subject to actual provable prejudice in his indictment and trial, rather than the prejudice which is presumed cannot be determined because of the absence of an evidentiary hearing, however, we do not think this Court can logically make any "prospective only" standard, where at least some white people are the victims of actual, as opposed to presumed, prejudice.

Therefore, if the decisions need be made this Court should decide on a generalized application of the rule as in the cases of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed. 2d 799; *McNerlin v. Denno*, 378 U.S. 575, 84 S.Ct. 1933, 12 L. Ed. 2d 1041 (1964); *Eskridge v. Washington*

State Prison Board, 357 U.S. 214, 78 S.Ct. 1061, 2 L. Ed. 2d 1269 (1958) and *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed. 2d 476 (1968).

CONCLUSION

Petitioner, a white man, has alleged the denial of due process and equal protection by systematic exclusion of negroes from his trial and grand juries. Such allegations should be held by this Court to constitute a claim which, if proven, would entitle petitioner to relief. The right of a white person to complain of systematic racial exclusion of blacks should be held to be retrospective in application. This Court should reverse the holding of the Court below.

Respectfully submitted,

EDWARD T. M. GARLAND
GARLAND & GARLAND
229 Candler Building
Atlanta, Georgia 30303
Attorney for Petitioner

FEB 12 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-5078

DEAN RENE PETERS,

Petitioner,

v.

C. P. KIFF, WARDEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

COURTNEY WILDER STANTON
Assistant Attorney General

DOROTHY T. BEASLEY
Assistant Attorney General

DAVID L. G. KING, JR.
Assistant Attorney General
Attorneys for Respondent

P. O. ADDRESS:

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334

TABLE OF CONTENTS

	Page
STATEMENT OF THE QUESTION	1
SUMMARY OF ARGUMENT	2
ARGUMENT:	
I. The alleged exclusion of members of the Negro race from the grand jury which indicted a member of the Caucasian race does not constitute a denial of equal protection of the laws to the white defendant without a showing of facts which might show discrimination against him.	4
A. A white man is not treated unequally when Negroes are excluded from his grand jury; therefore, the first prerequisite to establishing an unconstitutional denial of equal protection of the laws is absent in this case.	4

TABLE OF CONTENTS-Cont.

Page

B. Unless a person belongs to the excluded class, he must establish that the absence of the particular class from his grand jury somehow effected the impartiality of the grand jury determination. 11

C. Decisions of this Court, construing federal statutes and their application to federal juries, do not dispense with the requirement of class membership or prejudice when constitutional questions are raised as to state proceedings. 18

II. The issue concerning retroactivity is not properly before this Court for review. . . 23

CONCLUSION 25

Page

TABLE OF CASES

Allen v. State, 110 Ga. App. 56 (1964) 8, 9, 13

Bailey v. Henslee, 287 F.2d 936 (8th Cir. 1961) 15

Ballard v. United States, 329 U.S. 187 (1946) 18

Beck v. Washington, 359 U.S. 541 (1962) 16

Billingsley v. Clayton, 320 F.2d 13 (5th Cir. 1966), cert. denied, 385 U.S. 841 (1966) . . 15

Blauvelt v. Holman, 237 F. Supp 385 (M.D. Ala. 1954) 17

Bokulich v. Jury Comm'n., 298 F. Supp. 181 (N.D. Ala. 1968) aff'd. 394 U.S. 97 (1969) . . 12, 13

Brown v. New Jersey, 175 U.S. 172 (1899) 15

TABLE OF CASES-Cont.

Page

Carter v. Greene County, 396 U.S. 320 (1970) 5, 6

Cash v. Smith, 226 Ga. 318 (1970). 21

Fay v. New York, 332 U.S. 261 (1946). . . 8, 9, 10, 12, 15, 19, 18

Fleming v. Kelly, 438 F.2d 1147 (5th Cir. 1971), judgment reinstated 438 F.2d 1147 (5th Cir. 1971) 17

George v. United States, 196 F.2d 445 (9th Cir. 1952) 17

Glasser v. United States, 315 U.S. 60 (1941). 18

Griffin v. State, 183 Ga. 775 (1937). 21

Hernandez v. Texas, 347 U.S. 475 (1953). 8

King v. Cook, 297 F. Supp. 99 (N.D. Miss. 1969) 17

TABLE OF CASES-Cont.

Page

McNabb v. United States, 318 U.S. 332, 87 Led 819, 63 SCt 608 (1942) 20

Mosely v. Smith, 404 F.2d 346 (5th Cir. 1968) 17

Murphy v. Holman, 242 F. Supp. 480 (M.D. Ala 1965) 17

Namet v. United States, 373 U.S. 179, 190 (1963) 5

Rabinowitz v. United States, 366 F.2d 34 (5thCir. 1966) 14

Reynolds v. Reynolds, 217 Ga. 234 (1961) 21

Salisbury v. Grimes, 406 F.2d 50 (5th Cir. 1969) . . 11, 16, 17, 20

Simmons v. State, 226 Ga. 110 (1970) 21

Smith v. Brough, 248 F. Supp. 435 (D.C. Md 1965), aff'd. 362 F.2d 763 (4th Cir. 1966) .13, 15, 17

State v. Madison, 213 A.2d 880 (Md. 1965) 13

TABLE OF CASES-Cont.

Page

Strauder v. West Virginia, 100 U.S. 303 (1879) 5, 6, 7, 12

Thiel v. Southern Pac. Co., 328 U.S. 217 (1945) 18, 19

Truax v. Corrigan, 257 U.S. 312 (1921) 6

United States ex rel. Darcy v. Handy, 351 U.S. 454 (1955) . . . 16

United States v. Valentine, 288 F. Supp. 957 (D.P.R. 1968) . 11, 17, 20

Woodruff v. Breazeale, 291 F. Supp. 130 (N.D. Miss. 1967), aff'd. 401 F.2d 997 (1968) . 11, 17

Whitus v. Georgia, 385 U.S. 545 (1967) 24

STATUTORY PROVISIONS

	Page
18 U.S.C. § 243	12
Ga. Laws 1967, p. 251 [Ga. Code Ann. § 59-106 (1971 Supp.)]. . .	21
United States Supreme Court Rules, Rule 23(c)(1).	5

IN THE

SUPREME COURT OF THE UNITED STATES

1971 Term
NO. 71-5078

DEAN RENE PETERS,

Petitioner,

v.

C. P. KIFF, WARDEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

---

BRIEF FOR RESPONDENT

STATEMENT OF THE QUESTION

Is a member of the Caucasian race, who claims no identity with the Negro race and no discrimination resulting against him,

entitled in a habeas corpus proceeding to have an otherwise valid State conviction set aside on the basis that an alleged exclusion of members of the Negro race from the grand jury which indicted him, denied him equal protection of the laws?

[Neither part (b) of Petitioner's first question as presented in his Brief (page 4), nor his second question are involved in this review.]

SUMMARY OF ARGUMENT

When a black man is indicted by a jury from which members of the Negro race have been systematically excluded, he is placed in a position of inequality which is condemned by the equal protection clause of the Fourteenth Amendment. In such cases the law recognizes and presumes that race prejudice infects the determination of the grand jury and, therefore, finds that the defendant has not been afforded the impartial and fair consideration to which he is entitled. But the same inequality does not exist as to a white man indicted by the same body; in addition, the presumption of bias or partiality cannot be recognized under these same circumstances. A white man, such as Dean Rene Peters, must identify himself with the excluded class in order to employ the evidentiary benefits of the presumption of partiality.

Without this, he is not in an unequal position as to other defendants and is not denied equal protection of the law.

The question of retroactivity is not involved in this case. If a rule is framed in this case which would find a denial of equal protection to a white man when black men are excluded from grand jury service, then the present Petitioner would be given the benefit of the rule.

ARGUMENT

I.

THE ALLEGED EXCLUSION OF MEMBERS OF THE NEGRO RACE FROM THE GRAND JURY WHICH INDICTED A MEMBER OF THE CAUCASIAN RACE DOES NOT CONSTITUTE A DENIAL OF EQUAL PROTECTION OF THE LAWS TO THE WHITE DEFENDANT WITHOUT A SHOWING OF FACTS WHICH MIGHT OTHERWISE IDENTIFY HIM WITH THE EXCLUDED CLASS OR WHICH MIGHT SHOW DISCRIMINATION AGAINST HIM.

A. A white man is not treated unequally when Negroes are excluded from his grand jury; therefore, the first prerequisite to establishing an unconstitutional denial of equal protection of the laws is absent in this case.

Dean Rene Peters has appealed to this Court seeking a correction of the Fifth Circuit's determination that he, as a member of the Caucasian race and as an individual with no identifiable ties with the Negro community or to persons of the Negro race, was not denied equal protection of the laws as guaranteed under the Fourteenth Amendment to the United States Constitution when he was indicted by a jury from which Negroes had allegedly been intentionally excluded. (A. 20-21).

The court below ruled that equal protection was not denied. Due process considerations were not discussed in the court's opinion nor ruled on. Petitioner here makes no complaint about the decision of the court below in this regard and, therefore, cannot now newly inject due process arguments. The case on certiorari is limited to a review of the equal protection claim. Further, it is limited to a review only as it applies to the grand jury, which is the extent of the question as framed by Petitioner in his petition to this Court. Namet v. United States, 373 U.S. 179, 190 (1963); Rules of the Supreme Court, Rule 23(1)(c).

This Court has consistently, since the adoption of the Fourteenth Amendment, condemned the practice of intentional exclusion, on the basis of race, of any person otherwise qualified to serve as a juror, from such participation. Compare Strauder v. West Virginia, 100 U.S. 303 (1879), with Carter v. Greene County, 396 U.S. 320 (1970). In the administration of otherwise constitutional statutes controlling the selection of jurors, all citizens within the jurisdiction of a particular state are entitled to equal consideration and treatment in the actual application of those statutes. When this Court has considered equal protection challenges on the administration of a

state's jury selection system, the traditional proceeding in which the issue has arisen has been an individual defendant's challenge on a state criminal conviction. See Carter v. Greene County, supra at 329. There is, then, a wealth of precedent from which to examine and determine the necessary prerequisites in establishing that a given criminal conviction is constitutionally defective on the basis that the individual involved has been denied equal protection of the laws.

Concisely, when the Fourteenth Amendment prohibits any state from depriving any person within its jurisdiction of the equal protection of the laws, it commands that all persons, similarly situated, shall be treated in a like manner. Truax v. Corrigan, 257 U.S. 312, 328 (1921). The general purpose of this protection is to prevent "undue favor and individual or class privilege, on the one hand, and a hostile discrimination or the oppression of inequality, on the other." Truax v. Corrigan, supra, at 332-3. In the context of the particular type of unequal treatment alleged to have existed in Peters' original criminal proceeding, the equal protection clause is adapted to ensure that a black man not be indicted or tried by juries from which the latter's race has been intentionally excluded. Strauder v. West Virginia, 100 U.S. 303, 307 (1879).

To place a man on trial before and under a system from which members of his race have been intentionally excluded places him in an initial position of inequality which is condemned under the relevant constitutional protection:

> "It is well known that prejudices often exist against particular classes in a community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." Strauder v. West Virginia, 100 U.S. 303, 309 (1879) [emphasis added]

Charging a black man with the same crime as a white man is charged with, and subjecting him to the same penalty, takes on fatal denial of equal protection of the laws when members of the black man's own race are intentionally excluded from the charging and trying juries. Similarly situated white persons are simply treated more favorably in such situations, and it is this prejudicial disparity in treatment that cannot allow a black man's conviction to stand under the Constitution.

It does not follow, however, that a white man is denied equal protection of the

laws when members of the black race are allegedly excluded from the jury which determines the possible existence of probable cause to bring a man to trial. In this context, class membership is not a constitutional requirement which defeats an otherwise valid claim under the Fourteenth Amendment, see Fay v. New York, 332 U.S. 261, 287 (1946), but rather it is a requirement which keeps the equal protection claim from ever being established in the first place. If and when a particular exclusion of a given class from the jury system is determined to be impermissible under the Fourteenth Amendment, equal protection deprivations are established, but only as to the person against whom such intentional or unintentional discriminations are directed. See Hernandez v. Texas, 347 U.S. 475, 478 (1953).

The position taken by Petitioner Peters that he as well as any defendant indicted by juries from which Negroes have been intentionally excluded is entitled to have his conviction set aside is founded to a large degree on language extracted from the opinion of the Georgia Court of Appeals in Allen v. State, 110 Ga. App. 56, 62 (1964). In turn, the Allen opinion relies on language quoted from the dissenting opinion in Fay v. New York, 332 U.S. 261, 298 (1946):

> "The equal protection clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community."

What the Allen court failed to either recognize or distinguish, is that the equal protection claim that the dissenting opinion in Fay v. New York, supra, argued had been established, was founded on the fact that Fay had been tried by a special jury while the majority of defendants in New York had been tried by general juries. In other words, Fay had a basis upon which to base a denial of equal protection because there existed, by operation of the laws in his state, two distinct classes of defendants; as the court pointed out:

> "But we are dealing here with a very subtle and sophisticated form of discrimination which does not lend itself to easy or precise proof. The proof here is adequate enough to demonstrate that this panel, like every discriminatorily selected 'blue ribbon' panel, suffers from a constitutional infirmity. That infirmity is the denial of equal protection

> to those who are tried by a jury drawn from a 'blue ribbon' panel. Such a panel is narrower and different from that used in forming other juries to try the vast majority of other accused persons. To the extent of that difference, therefore, the persons tried by 'blue ribbon' juries receive unequal protection." Fay v. New York, 332 U.S. 261, 299 (1946).

When claiming a denial of equal protection of the laws, the necessity of establishing a dual system in which the complaining party is a member of the class of individuals against whom the unlawful discrimination operates is very much an element of the claim.

B. Unless a person belongs to the excluded class, he must establish that the absence of the particular class from his grand jury somehow effected the impartiality of the grand jury determination.

The identity aspect of the constitutional denial asserted in this proceeding is one that is viable and necessary. Unlawful discriminations created by statutes or acts of state officials do not operate to injure those in whose favor those discriminations are made. See generally Salisbury v. Grimes, 406 F.2d 50, 51 (5th Cir. 1969) (holding that a showing of bias or prejudice is necessary to raise a question of constitutional dimensions, and stating specifically that there can be no racial prejudice between members of the same); Woodruff v. Breazeale, 291 F.Supp. 130, 132 (N.D. Miss. 1967), aff'd. 401 F.2d 997 (1968); United States v. Valentine, 288 F.Supp. 957 (D.P.R. 1968). In the traditional jury discrimination case brought and initiated by an individual who is a member of the unlawfully excluded class, the element of personal prejudice or harm in the equal protection cause of action is a requirement. However, in such a case the element is

simply presumed to exist as a matter of law. Strauder v. Virginia, 100 U.S. 303 309 (1879). This same presumption exists in the reasoning behind the provisions of 18 U.S.C. § 243, which declares it a crime for any persons to discriminate in the selection of jurors on the basis of race. But that same presumption simply does not exist when an individual not otherwise identified with the excluded class seeks to show a denial, as to him, of the equal protection of the laws. In his case, the judicially cognizable facts which support presumption are simply absent. A white man, asserting that the exclusion of black men on his grand jury denied him equal protection of the law must "comply with the exacting requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process." Fay v. New York, supra at 284.

Compliance with this requirement is evidenced in the recent case of Bokulich v. Jury Commission of Green County, 298 F.Supp. 181 (N.D. Ala. 1968), aff'd. 394 U.S. 97 (1969).

Claiming that trial by a jury from which Negroes have been systematically excluded would prejudice him in his de-

fense and otherwise deny him equal protection of law, Bokulich established his identity with the excluded class by showing that although he was white, he was also a civil rights worker associated with the Southern Christian Leadership Conference. The Court properly noted that while the case in which the complaining party is of the same racial group as that alleged to be excluded is a clear instance of potential violation of equal protection, such a situation does not set the outer limits of the guarantee or the right to complain of the violation. Bokulich v. Jury Comm'n, supra, at 185 n. 2. This, of course, was the situation in Allen v. State, 110 Ga. App. 56, 62 (1964). 1/ See also

---

1/ There appears to be only one decision favoring a party claiming constitutional deprivations on the basis of a class exclusion from the jury selection process who was not actually identified with the group. State v. Madison, 213 A.2d 880 (Md. 1965). Upon review of the identical question by a federal court, the reasoning of the State court on the federal question was rejected. Smith v. Brough 248 F.Supp. 435, 440-2 (D.C. Md. 1965), aff'd. 362 F.2d 763 (4th Cir. 1966).

Rabinowitz v. United States, 366 F.2d 34, 37 (5th Cir. 1966) ("standing" was not raised as an issue, however, since the official shortcoming found in the case was based specifically on the failure to properly implement federal statutes -- "We do not legislate for Congress; we do effectuate that policy which Congress through its legislation has directed us to implement.")

The requirement of prejudice or class identity to establish the equal protection claim should be maintained as an integral part of any person's case, particularly in a post-conviction proceeding where the issue was not raised at the original trial and the state did not have the opportunity to cure the error, if any:

> "The question whether there was a violation of a defendant's rights under the Fourteenth Amendment should turn on whether the facts and circumstances show some prejudice or likelihood of prejudice as a result of the exclusion. If the facts and circumstances show merely a bare possibility of prejudice, or no prejudice at all, it is doubtful whether a deprivation

> of due process or equal protection of the laws has been shown." Smith v. Brough, 248 F.Supp. 435, 442 (D.C. Md. 1965), aff'd. 362 F.2d 763 (4th Cir. 1966).

Even when the constitutional claim raised in an individual case concerns the due process clause of the Fourteenth Amendment, the requirement of harm in the individual case has been maintained. See Fay v. New York, supra, at 287. (The court invoked the identity or prejudice requirement at the point in the opinion where the question of whether or not Fay had been denied due process of law was being considered; the conclusion had already been reached that the dual jury system in New York did not deny individuals equal protection of the laws.)

The fundamental right involved in this proceeding is Peters' right to a just and fair determination by an unbiased, unprejudiced and impartial grand jury. See Brown v. New Jersey, 175 U.S. 172, 175 (1899); Billingsley v. Clayton, 320 F.2d 13, 15, cert. den. 385 U.S. 841 (1966); Bailey v. Henslee, 287 F.2d 936, 941 (8th Cir. 1961). Without more, it is difficult to see how a white man such as Peters could have been denied an im-

partial judgment, per se, as a result of the exclusion of members not of his own race. In order to claim that this impartiality was somehow effected, identifiable prejudice should be shown, and is in fact required if a claim of constitutional dimensions is to be raised:

> "Bereft of the racial argument, the appellant has neither alleged nor shown any bias or prejudice in the grand jury which indicted him. He has thus failed to raise a question of constitutional dimensions." Salisbury v. Grimes, 406 F.2d 50, 51 (5th Cir. 1969).

Peters claims that his trial was essentially unfair, but he does not raise one fact which would indicate that the grand jurors who considered his guilt were somehow partial or biased. This he is required to do, not as a matter of speculation but as a matter of demonstrable reality. See United States ex rel. Darcy v. Handy, 351 U.S. 454, 462 (1955); Beck v. Washington, 359 U.S. 541, 558 (1962).

The requirement of prejudice, then, is an integral and necessary portion of Peters' case, if he is to

succeed. That he is white does not itself defeat his case, but he is required to make some showing that would indicate that the exclusion of blacks in his case adversely affected the impartial consideration of the grand jury. Without more, a white man is not denied equal protection of the laws by the exclusion alleged to exist in this particular case. Fleming v. Kelly, 438 F.2d 1147 (5th Cir. 1971), judgment reinstated, 438 F.2d 1147 (5th Cir. 1971); Salisbury v. Grimes, 406 F.2d 50, 51 (5th Cir. 1969); Mosely v. Smith, 404 F.2d 346, 347 (5th Cir. 1968); King v. Cook, 297 F.Supp. 99, 103 (N.D. Miss. 1969); Murphy v. Holman, 242 F.Supp. 480, 482 (M.D. Ala. 1965); Blauvelt v. Holman, 237 F.Supp. 385 (M.D. Ala. 1954); Woodruff v. Breazeale, 291 F.Supp. 130 (N.D. Miss. 1967), aff'd. 401 F.2d 997 (1968); see also Smith v. Brough, 248 F.Supp. 435, 440-2 (D. Md. 1965), aff'd. 362 F.2d 763 (1966); George v. United States, 196 F.2d 445, 452 (9th Cir. 1952); United States v. Valentine, 288 F.Supp. 957, 969-70 (D.P.R. 1968).

C. Decisions of this Court, construing federal statutes and their application to federal juries, do not dispense with the requirement of class membership or prejudice when constitutional questions are raised as to state proceedings.

Petitioner Peters asserts that cases decided by this Court have effectively rejected the rule that either class identity or, in its broader context, prejudice are required when a particular jury system is challenged on constitutional grounds. Ballard v. United States, 329 U.S. 187 (1946), Thiel v. Southern Pac. Co., 328 U.S. 217 (1945), and Glasser v. United States, 315 U.S. 60 (1941) do not have this effect. In the first place, each case was considered in Fay v. New York, 332 U.S. 261, 287-8 (1946), and the court there refused to accept the position being pressed by Peters here. The Fay court recognized the identity requirement, but, in the alternative, determined that the particular type of exclusions involved did not affect to any identifiable degree the impartiality of the jurors which tried the case. Fay v. New York, supra, at 287 and 292-3. This was required, for unlike the situation in Ballard, Thiel and Glasser, the court in Fay was considering questions of constitutional dimensions and not the application

and obligation imposed by Congressional statutes on federal criminal procedure. That some identifiable effect on the impartiality of jurors is required in order to raise a constitutional question is evidenced by the following:

> "No significant difference in viewpoint between those allegedly excluded and those permitted to serve has been proved and nothing in our experience permits us to assume it. It would require large assumptions to say that one's present economic status, in a society as fluid as ours, determines his outlook in the trial of cases in general or of this one in particular. * * * But we are not ready to assume that these differences of function degenerate into a hostility such that one cannot expect justice at the hands of occupations and groups other than his own." Fay v. New York, supra, at 292.

As for the class requirement or the requirement of prejudice when questions of constitutional dimensions are considered, Thiel v. Southern Pac. Co., supra, at 225, specifically infers that they are mandatory prerequisites in such cases:

> "The trial court should have granted petitioner's motion to strike the panel. That conclusion requires us to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the Federal Courts. See McNabb v. United States, 318 US 332, 340, 87 L ed 819, 823, 63 S Ct 608. On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class." [emphasis added]

While it is clear then that such legal challenges to the proper administration of statutes by government officials do not require identity or showing of prejudice, constitutional challenges do. See Salisbury v. Grimes, 406 F.2d 50, 51-2 (5th Cir. 1969); United States v. Valentine, 288 FSupp. 957, 969-70 (D.P.R. 1968)(stating that a litigant raising a constitutional challenge must establish his right to such has been prejudiced by the exclusion of which he complains, but a litigant invoking the supervisory jurisdiction must establish only a departure from the scheme of jury

selection, which Congress adopted.[2] Dean Rene Peters, not being a member of the excluded class, must make some showing which would enable a court to presume that race prejudice infected the minds of the grand jurors in his case. Without

---

2/ Ga. Laws 1967, p. 251 [Ga. Code Ann. § 59-106 (1971 Supp.)] now requires that jury commissioners select a fairly representative cross-section of the intelligent and upright citizens of the county from the official registered voters' list which was used in the last preceding general election. There is no apparent reason why a timely challenge by any party litigant to the array of grand or traverse jurors on the basis that the commissioners had not fulfilled their legal duty under this section could not be made. See Simmons v. State, 226 Ga. 100, 112 (1970); cf. Reynolds v. Reynolds, 217 Ga. 234, 263 (1961); Griffin v. State, 183 Ga. 775, 777 (1937). When a constitutional challenge is made, however, the requirement of identity or prejudice is maintained. Cash v. Smith, 226 Ga. 318 (1970).

this, the alleged exclusionary practice would not deny him equal protection of the laws as guaranteed by the Fourteenth Amendment.

II.

THE ISSUE CONCERNING RETROACTIVITY IS NOT PROPERLY BEFORE THIS COURT FOR REVIEW.

As with the first question presented to this Court in Petitioner's brief, the second one raises some difficulty in relation to the proceedings below, the petition for certiorari, and case in general. First, there has never been any issue as to whether or not, if a court recognized correctness of the claim raised, Peters could receive the benefit of that decision in his case. The Respondent has never argued that even if Petitioner were correct, some rule of retroactivity would yet prevent his being granted relief. Also, the original petition for certiorari merely listed the question as to possible retroactive application of a rule this Court might establish in this case (Petition, p. 3), but the point was not argued or briefed in the application. Without the point being raised in the proceedings below and without the point being pursued in the petition for certiorari in this Court, it is simply not a proper question for consideration.

If Petitioner Peters seeks the benefit of a rule establishing the right of any person, regardless of his identity, to challenge his conviction on the basis that Negroes were intentionally excluded from the indicting grand jury, then it is quite unclear how a question of retroactivity concerns Peters, or what rule he believes should be "retrospectively" applied to his 1966 indictment. Reference is made in Petitioner's brief to Whitus v. Georgia, 385 U.S. 545 (1967), but the issue in that case has no bearing on the question now being considered.

On the other hand, if this case establishes a new rule, there would be little doubt that the benefit of the rule would be applied to Peters; if this were not so, there would be no case or controversy in the first place. A question of retrospective or prospective application of the "Peters rule", whatever it might be, is not appropriately pursued by him because the outcome would not affect him. It does not, at least, constitute one of the issues on the merits, as he has sought to make it.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

COURTNEY WILDER STANTON
Assistant Attorney General

DOROTHY T. BEASLEY
Assistant Attorney General

DAVID L. G. KING, JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Dorothy T. Beasley, Attorney of Record for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Brief for Respondent on the Petitioner by depositing copies of the same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses:

EDWARD T. M. GARLAND
Garland & Garland
229 Candler Building
Atlanta, Georgia 30303

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
10 Columbus Circle
New York, New York 10019

This 11th day of February, 1972.

DOROTHY T. BEASLEY

FILE COPY JAN 27 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5078

Supreme Court, U.S.
FILED
FEB 22 1972
E. ROBERT SEAVER, CLERK

DEAN RENE PETERS,

Petitioner,

v.

C. P. KIFF,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
10 Columbus Circle
New York, New York 10019

Attorneys for the NAACP Legal Defense and Educational Fund, Inc.

INDEX

PAGE

Motion for Leave to File Brief Amicus Curiae and Statement of Interest of Amicus 1

ARGUMENT 1

I. The Due Process Clause Requires That Juries Reasonably Reflect a Cross-Section of the Community 2

II. Petitioner Can Challenge the Exclusion of Blacks Under the Reasoning of *Barrows* v. *Jackson* 4

III. A Decision That White Defendants May Challenge Discrimination Against Blacks in Jury Selection Should Be Made Fully Retroactive 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:

Alexander v. Louisiana, O. T. 1971, No. 70-5026 5

Allen v. State, 110 Ga. App. 56, 137 S.E.2d 711 (1964) .. 3

Avery v. Georgia, 345 U.S. 559 (1953) 3

Ballard v. United States, 329 U.S. 187 (1946) 2, 3

Barrows v. Jackson, 346 U.S. 249 (1953) 2, 5

Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970) 2

Fay v. New York, 332 U.S. 261 (1947) 2

PAGE

Hill v. Texas, 316 U.S. 400 (1942) 4

Maryland v. Madison, 240 Md. 265, 213 A.2d 880 (1965) 3

Patton v. Mississippi, 332 U.S. 463 (1947) 2

Smith v. Texas, 311 U.S. 128 (1940) 4
Stovall v. Denno, 388 U.S. 293 (1967) 6
Strauder v. West Virginia, 100 U.S. 303 (1880) 4

Turner v. Fouche, 396 U.S. 346 (1970) 5

United States ex rel. Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959) 5

Vanleeward v. Rutledge, 369 F.2d 584 (5th Cir. 1966) .. 3

Whitus v. Balkcom, 333 F.2d 496 (5th Cir. 1964) 5
Whitus v. Georgia, 385 U.S. 545 (1967) 3
Williams v. Florida, 399 U.S. 78 (1970) 2
Witherspoon v. Illinois, 391 U.S. 510 (1968) 6

Statute:

18 U.S.C. §243 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5078

DEAN RENE PETERS,

Petitioner,

v.

C. P. KIFF,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND STATEMENT OF INTEREST OF *AMICUS*

Movant N.A.A.C.P. Legal Defense and Educational Fund, Inc., respectfully moves the Court for permission to file the attached brief *amicus curiae,* for the following reasons. The reasons assigned also disclose the interest of the *amicus.*

(1) Counsel for the petitioner has consent to the filing of a brief *amicus curiae* by the movant. The present motion is necessitated because counsel for the respondent has refused consent.[1] On January 21, 1972, counsel for amicus mailed to counsel for respondent the final manuscript of this motion and brief. Therefore, respondent received the

[1] The letters of petitioner and respondent granting and refusing consent are on file with the clerk of this Court.

brief in ample time to allow it to respond to the arguments made therein, if it so desired in its brief, due February 9, 1972.

(2) Movant N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

(3) Over a long period of time, LDF attorneys have handled, here and in other courts, many cases involving the unconstitutional exclusion of blacks from jury venires.[2] Despite success in these cases, the problem of discrimination in this vital facet of the administration of criminal justice persists. This experience has led *amicus* to the conclusion that its goal, the final eradication of jury discrimination, will be substantially advanced by a decision in the present case that all criminal defendants may challenge such discrimination. Thus, *amicus* has an interest in the

---

[2] *E.g.*, *Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Sims* v. *Georgia*, 389 U.S. 404 (1967); *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320 (1970); *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Alexander* v. *Louisiana*, O. T. 1971, No. 70-5026.

present case beyond that of the immediate litigants and therefore presents in the attached brief a broader and alternative basis in support of petitioner's position.

WHEREFORE, movant prays that the attached brief *amicus curiae* be permitted to be filed with the Court.

Respectfully submitted,

Charles S. Ralston

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
10 Columbus Circle
New York, New York 10019

Attorneys for the NAACP Legal Defense and Educational Fund, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5078

DEAN RENE PETERS,

Petitioner,

v.

C. P. KIFF,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

ARGUMENT

Because the petition for writ of habeas corpus was denied without a hearing, the facts are not in dispute here. Thus, this case presents squarely the issue of whether a white defendant may have his indictment quashed or his conviction reversed on the ground that blacks have been excluded from juries in violation of the Constitution and statutes of the United States. We urge that two independent reasons require an affirmative answer: (1) all defendants have the right under the due process clause to be indicted and tried by juries that reflect a cross-section of the com-

munity, *i.e.*, from which no significant group has been excluded; and (2) a defendant has standing to enforce the rights of the excluded group even if he is not a member of it under the reasoning of *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

I

The Due Process Clause Requires That Juries Reasonably Reflect a Cross-Section of the Community.

This case raises squarely the issue left open by this Court in *Fay* v. *New York*, 332 U.S. 261 (1947), whether the due process clause alone bars the exclusion of racial groups from juries so that the constitutional rights of defendants not members of the excluded group are violated. See, 332 U.S. at 284, n. 27. Amicus urges that the proper view is that there is an independent due process right to be indicted and tried by a jury selected from venires that fairly represent a cross-section of the entire community. This requirement arises from "the very idea of a jury"[1] as a democratic institution[2] whose purpose is to interpose between the state and the accused a group of laymen who speak for the community *as a whole*.[3]

Here, of course, because of the exclusion of blacks, the jury did not represent the community as a whole. Indeed, it was composed in direct and flagrant violation of the Constitution and laws of the United States (18 U.S.C. §243) in spite of decisions of this Court dating back nine decades. *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); see, *Patton* v. *Mississippi*, 332 U.S. 463, 465, n. 3 (1947). The particu-

---

[1] *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320, 330 (1970).

[2] *Ballard* v. *United States*, 329 U.S. 187, 195 (1946).

[3] *Williams* v. *Florida*, 399 U.S. 78, 100 (1970).

lar device used to exclude blacks in petitioner's case—segregated tax digests—was struck down by this Court the year after he was convicted in *Whitus* v. *Georgia*, 385 U.S. 545 (1967). *Whitus* essentially followed, as directly controlling, the decision in *Avery* v. *Georgia*, 345 U.S. 559 (1953), decided thirteen years earlier. And see, *Vanleeward* v. *Rutledge*, 369 F.2d 584 (5th Cir. 1966).

Essentially, the State of Georgia argues that despite the fact that the juries that indicted and convicted petitioner were composed in clear violation of federal law, its illegal acts are insulated from attack here by the fortuity that the defendant is white.[*] We urge that this Court rather adopt the enlightened view of the Supreme Court of Maryland and hold that: "every person accused of crime has the right to be tried under what has been determined to be the law of the land," *Maryland* v. *Madison*, 240 Md. 265, 213 A.2d 880, 882 (1965). See also, *Allen* v. *State*, 110 Ga. App. 56, 137 S.E.2d 711 (1964).

In *Madison*, the court held that a believer in God had the right to be indicted by a jury from which nonbelievers had not been unconstitutionally excluded; in *Allen*, the court held that a white had the right to be tried by a jury from which blacks had not been similarly excluded. Both decisions rested on holdings of this Court interpreting federal jury statutes and held that their reasoning applied to constitutional challenges. As this Court said in *Ballard* v. *United States*, 329 U.S. 187, 195 (1946):

> The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution,

[*] In a sense, a white defendant is also denied equal protection by not being allowed to challenge the exclusion of blacks. That is, his conviction stands solely because of his race, since if he were black it would not. See, *Maryland* v. *Madison*, 240 Md. 265, 213 A.2d 880, 886 (1965).

to the community at large, and to the democratic ideal reflected in the processes of our courts.

All three cases recognized that it was a denial of due process in the most fundamental sense to permit a defendant to be deprived of liberty by a jury that was convened in violation of the Constitution. Again, the decisions rest on the necessity of protecting the jury system as an institution whose purpose is to protect the rights of *all* persons charged by the state by putting the ultimate decision as to their fate in the hands of "a body truly representative of the community." A jury otherwise constituted "is at war with our basic concepts of a democratic society and a representative government." *Smith* v. *Texas,* 311 U.S. 128, 130 (1940). See also, *Hill* v. *Texas,* 316 U.S. 400, 406 (1942).

II

Petitioner Can Challenge the Exclusion of Blacks Under the Reasoning of *Barrows* v. *Jackson*.

In Part I we have argued that a white defendant—indeed that *all* defendants—have a personal right under the due process clause to be indicted and tried by juries selected in accordance with the Constitution. In addition, we urge that white defendants should be given standing to enforce the right of blacks not to be denied equal protection and thus to effectuate fully the constitutional guarantees that this Court has so long sought to enforce.

It has been pointed out above that ever since 1880 this Court, in an undeviating line of decisions, has held that exclusion of blacks from jury service violates the law. Sadly, there has been an equally undeviating history of resistance to and circumvention of the holdings of this Court. Despite the passage of ninety years since *Strauder,*

this Court is still called on to strike down unconstitutional jury discrimination. See, *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Alexander* v. *Louisiana*, O.T. 1971, No. 70-5026.

We suggest that one explanation for this unfortunate fact is that jury officials have believed that they could, by and large, get away with unlawful discrimination in most cases. Only blacks could complain; and most black defendants lacked the resources to, and/or lawyers who would,[5] raise and prove jury discrimination claims.

If, however, this Court makes it clear that *no* conviction of *any* defendant may stand when blacks have been unlawfully excluded from juries, then there may be a different result. At long last, state officials may decide that they have more to lose than to gain by continuing jury discrimination. The rights of all concerned—black defendants, white defendants, and black prospective jurors—may finally become realities.

Thus, this case is closely analogous to *Barrows* v. *Jackson*, 346 U.S. 249 (1953). There, the Court held that a white homeowner could raise the constitutional right of blacks not to be denied equal access to housing by state action as a defense to an action for damages for violating a racial restrictive covenant. The specific basis for allowing standing to a white to raise the constitutional rights of blacks was that it was necessary for the effective enforcement of those rights. Otherwise, the use of restrictive covenants would be encouraged (346 U.S. at 254), just as here the continuation of discriminatory jury selection would be encouraged. And the refusal to allow petitioner to challenge the composition of his jury would have the sole effect "of giving vitality to" unlawful racial discrimination. See, 346 U.S. at 258.

---

[5] See, *United States ex rel. Goldsby* v. *Harpole*, 263 F.2d 71, 82 (5th Cir. 1959); *Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964).

It is true that in *Barrows* the Court was led to its holding partly by the fact that since it was unlikely that black prospective property buyers would come before the courts, the *only* way to protect their rights would be to allow white property owners to defend in damage actions. On the other hand, the right of blacks to be free of discrimination in the jury selection process can and has been raised by blacks themselves. Nevertheless, *Barrows* should not be distinguished on that ground. As the experience of ninety years has shown, the problem of jury discrimination persists despite the fact that blacks can and do raise the issue. For the reasons set out above, we urge that only by allowing all defendant to challenge illegal jury selection methods will this blot on the administration of justice be eradicated once and for all. Thus, the same concepts of public policy that were determinative in *Barrows* should govern here.

III

A Decision That White Defendants May Challenge Discrimination Against Blacks in Jury Selection Should Be Made Fully Retroactive.

Petitioner, in his brief, explains why, under the standards set out by this Court in *Stovall* v. *Denno,* 388 U.S. 293 (1967), a decision that white defendants may challenge the illegal exclusion of blacks from juries should be made fully retroactive. We add two brief comments.

First, we urge that the most analogous case is *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968). There, this Court held that its new rule that persons with scruples against the death penalty could not be excluded from juries in capital cases was to be fully retroactive. This was because the wrongful exclusion of such persons "undermined 'the very integrity of the . . . process' " by which a defendant's fate

was determined. 391 U.S. at 523, n. 22. Similarly here, for the reasons set out above, the unlawful exclusion of blacks totally undermines the proper functioning of the jury system.

Second, we suggest that the retroactive giving to white defendants a right long enjoyed by blacks will not have a harmful effect on the administration of justice, *i.e.*, it would not result in a general jail release. It must be remembered that what is involved here is the possible application of the *Whitus* decision to whites. Therefore, an examination of the impact of *Whitus* on black prisoners is instructive. (1) According to data available from the Georgia Department of Corrections, in the year July 1967—July 1968 (the year following *Whitus*), a substantial majority of the inmates of the Georgia prison system were black (5139 out of 8629). Thus, the retroactive application of a decision favorable to petitioner in this case would affect a minority of those convicted in Georgia. (2) As the figures cited above show, *Whitus* had the potential of releasing nearly 60% of those incarcerated in Georgia when it was handed down. Nevertheless, subsequent figures indicate no such general jail delivery. Thus, in 1971 the number of blacks and the total number of prisoners was approximately the same (4991 out of 8205) as in 1967-68. There is no reason to expect any more deleterious effect from a decision in this case than there was from *Whitus*.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
10 Columbus Circle
New York, New York 10019

Attorneys for the NAACP Legal Defense and Educational Fund, Inc.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PETERS *v.* KIFF, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71–5078. Argued February 22, 1972—Decided June 22, 1972

Petitioner contends in this habeas corpus proceeding that the systematic exclusion of Negroes from the grand jury that indicted him and the petit jury that convicted him deprived him of his rights to due process and equal protection. The Court of Appeals affirmed the District Court's denial of relief on the ground that petitioner, not being a Negro, suffered no unconstitutional discrimination. *Held*: The judgment is reversed. Pp. 2–—.

441 F. 2d 370, reversed and remanded.

MR. JUSTICE MARSHALL, joined by MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART, concluded that:

1. Petitioner, under the circumstances of this case, has not abandoned his challenge to the petit jury by failing to include it in the list of questions presented by the writ of certiorari. Pp. 1–3.

2. A State cannot, consistent with due process, subject a defendant to indictment by a grand jury or trial by a petit jury that has been selected in an arbitrary and discriminatory manner contrary to federal constitutional and statutory requirements, and regardless of any showing of actual bias, petitioner had standing to attack the systematic exclusion of Negroes from grand jury and petit jury service. Pp. 3–11.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN and MR. JUSTICE POWELL, would implement the longstanding and strong policy of 18 U. S. C. § 243 against excluding qualified jurors on account of race by permitting petitioner to challenge his conviction on the ground that Negroes were arbitrarily excluded from the grand jury that indicted him. *Hill* v. *Texas*, 316 U. S. 400. Pp. 1–2.

Syllabus

MARSHALL, J., announced the Court's judgment and delivered an opinion, in which DOUGLAS and STEWART, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which BRENNAN and POWELL, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–5078

Dean Rene Peters, Petitioner,
v.
C. P. Kiff, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 22, 1972]

MR. JUSTICE MARSHALL announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART join.

Petitioner alleges that Negroes were systematically excluded from the grand jury that indicted him and the petit jury that convicted him of burglary in the Superior Court of Muscogee County, Georgia. In consequence he contends that his conviction is invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Because he is not himself a Negro, the State contends that he has not suffered any unconstitutional discrimination, and that his conviction must stand. On that ground, the Court of Appeals affirmed the denial of his petition for federal habeas corpus. 441 F. 2d 371 (CA5 1971).[1] We granted certiorari. 404 U. S. 964 (1971). We reverse.

[1] The history of this litigation is long and complicated. Petitioner was indicted on June 6, 1966. His first trial resulted in a conviction which was reversed on Fourth Amendment grounds, 114 Ga. App. 595 (1966). A second trial, held on December 8, 1966, resulted in the conviction challenged here, which was affirmed, 115 Ga. App. 743 (1967). Petitioner for the first time raised the claim of discriminatory jury selection in a petition for federal habeas corpus, which was summarily denied on July 5, 1967. The Court of Appeals affirmed on the ground that petitioner had failed to exhaust then-available state remedies with respect to his otherwise highly col-

I

At the outset, we reject the contention that the only issue before this Court is petitioner's challenge to the composition of the grand jury that indicted him. The State argues that the challenge to the petit jury is not before us, because it fails to appear in the list of questions presented by the petition for certiorari. We do not regard that omission as controlling, however, in light of the fact that the two claims have been treated together at every stage of the proceedings below, they are treated together in the body of the petition for certiorari, and they are treated together in the brief filed by petitioner on the merits in this Court. Petitioner cannot fairly be said to have abandoned his challenge to the petit jury, and the State has had ample opportunity to respond to that challenge, having done so at length below.[2]

Moreover, in this case the principles governing the two claims are identical. First, it appears that the same selection process was used for both the grand jury and the petit jury.[3] Consequently, the question whether

---

orable claim. 397 F. 2d 731, 735–741 (CA5 1968). Petitioner then filed a second petition for federal habeas corpus on the same ground alleging that intervening state court decisions clearly foreclosed his claim in the state courts. That petition was denied on the grounds (1) that it was repetitious, (2) that petitioner had failed to exhaust and (3) that his claims were lacking in merit. App. 15. The Court of Appeals again affirmed, rejecting the first two grounds and resting entirely on the third, *i. e.*, rejecting petitioner's substantive claims. 441 F. 2d 370 (1971). The exhaustion point thus having been resolved in petitioner's favor below, the State quite properly does not press it here.

[2] See Brief of Appellee in Court of Appeals, at 28–43.

[3] The jury lists were made up from the tax digests, which were by law segregated according to race; moreover, the jury lists contained a proportion of Negroes much smaller than the proportion in the population or in the tax digests. The jury selection system of Muscogee County, Georgia, was explored in detail and struck down as

jurors were in fact excluded on the basis of race will be answered the same way for both tribunals. Second, both the grand jury and the petit jury in this case must be measured solely by the general Fourteenth Amendment guarantees of due process and equal protection, and not by the specific constitutional provisions for the grand jury and the petit jury. For the Fifth Amendment right to a grand jury does not apply in a state prosecution. *Hurtado* v. *California*, 110 U. S. 516 (1884). And the Sixth Amendment right to a petit jury, made applicable to the States through the Due Process Clause of the Fourteenth Amendment in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), does not apply to state trials that took place before the decision in *Duncan*, as petitioner's trial did. *De Stefano* v. *Woods*, 392 U. S. 631 (1968). Accordingly, we turn now to the commands of equal protection, and of due process.

II

This Court has never before considered a white defendant's challenge to the exclusion of Negroes from jury service.[4] The essence of petitioner's claim is this:

---

unconstitutional in *Vanleeward* v. *Rutledge*, 369 F. 2d 584 (CA5 1966), contemporaneous with petitioner's trial. On petitioner's first federal appeal, the Court of Appeals suggested, though it did not hold, that the *Vanleeward* findings and conclusions on this point should be regarded as conclusive with respect to Peters, and thereby the expense and delay of a full evidentiary hearing might be avoided, 397 F. 2d, at 740.

[4] A number of state courts and lower federal courts have imposed a "same-class" rule on challenges to discriminatory jury selection, holding that the exclusion of a class from jury service is subject to challenge only by a member of the excluded class. Only a few courts have rejected the rule; *e. g.*, *Allen* v. *State*, 110 Ga. App. 56 (1964) (not followed by other panels of same court); *State* v. *Madison*, 240 Md. 265, 213 A. 2d 880 (1965). The cases are collected, and criticized, in Note, The Defendant's Challenge to a Racial Criterion in Jury Selection, 74 Yale L. J. 919 (1965). See also Note, The

that the tribunals which indicted and convicted him were constituted in a manner that is prohibited by the Constitution and by statute; that the impact of that error on any individual trial is unascertainable; and that consequently any indictment or conviction returned by such tribunals must be set aside.[5]

There can be no doubt that, if petitioner's allegations are true, both tribunals involved in this case were illegally constituted. He alleges that Negroes were systematically excluded from both the grand jury and the petit jury. This Court has repeatedly held that the Constitution prohibits such selection practices, with respect to the grand jury,[6] the petit jury,[7] or both.[8] Moreover, Congress has made it a crime for a public official to exclude anyone from a grand or petit jury on the basis of race, 18 U. S. C. § 243, and this Court upheld the statute, ap-

---

Congress, The Court and Jury Selection, 52 Va. L. Rev. 1069 (1966). This Court avoided passing on the "same-class" rule in *Fay* v. *New York*, 332 U. S. 261, 289–290 (1947), and has never since then approved or rejected it.

[5] He also claims his own rights under the Equal Protection Clause have been violated, a claim we need not consider in light of our disposition.

[6] *Alexander* v. *Louisiana*, 405 U. S. 625 (1972); *Arnold* v. *North Carolina*, 376 U. S. 773 (1964); *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Reece* v. *Georgia*, 350 U. S. 85 (1955); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Smith* v. *Texas*, 311 U. S. 128 (1940); *Pierre* v. *Louisiana*, 306 U. S. 354 (1939); *Rogers* v. *Alabama*, 192 U. S. 226 (1904); *Carter* v. *Texas*, 177 U. S. 442 (1900); *Bush* v. *Kentucky*, 107 U. S. 110 (1882).

[7] *Avery* v. *Georgia*, 345 U. S. 559 (1953); *Hollins* v. *Oklahoma*, 295 U. S. 394 (1935).

[8] *Sims* v. *Georgia*, 389 U. S. 404 (1967); *Jones* v. *Georgia*, 389 U. S. 24 (1967); *Whitus* v. *Georgia*, 385 U. S. 545 (1967); *Coleman* v. *Alabama*, 377 U. S. 129 (1964); *Patton* v. *Mississippi*, 332 U. S. 463 (1947); *Hale* v. *Kentucky*, 303 U. S. 613 (1938); *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Martin* v. *Texas*, 200 U. S. 316 (1906); *Neal* v. *Delaware*, 103 U. S. 370 (1880); *Strauder* v. *West Virginia*, 100 U. S. 303 (1879).

proving the congressional determination that such exclusion would violate the express prohibitions of the Equal Protection Clause. *Ex parte Virginia,* 100 U. S. 339 (1879). The crime, and the unconstitutional state action, occur whether the defendant is white or Negro, whether he is acquitted or convicted. In short, when a grand or petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances of the person making the claim.

It is a separate question, however, whether petitioner is entitled to the relief he seeks on the basis of that constitutional violation.. The State argues that even if the grand and petit jury were unconstitutionally selected, petitioner is not entitled to relief on that account because he has not shown how he was harmed by the error. It is argued that a Negro defendant's right to challenge the exclusion of Negroes from jury service rests on a presumption that a jury so constituted will be prejudiced against him; that no such presumption is available to a white defendant; and consequently that a white defendant must introduce affirmative evidence of actual harm in order to establish a basis for relief.

That argument takes too narrow a view of the kinds of harm that flow from discrimination in jury selection. The exclusion of Negroes from jury service, like the arbitrary exclusion of any other well-defined class of citizens, offends a number of related constitutional values.

In *Strauder* v. *West Virginia,* 100 U. S. 303, 308–309 (1879), this Court considered the question from the point of view of the Negro defendant's right to equal protection of the laws. *Strauder* was part of a landmark trilogy of cases, in which this Court first dealt with the problem of racial discrimination in jury selection. In *Strauder* itself, a Negro defendant sought to remove his criminal trial to the federal courts, pursuant to statute, on the ground

that Negroes were excluded by law from the grand and petit juries in the state courts; the Court upheld his claim. In *Virginia* v. *Rives*, 100 U. S. 313 (1879), a Negro defendant sought removal on the ground that there were in fact no Negroes in the venire from which his jury was drawn; the Court held that, without more, his claim did not come within the precise terms of the removal statute. Finally, in *Ex parte Virginia*, 100 U. S. 339 (1879), a state judge challenged the statute under which he was convicted for the federal crime of excluding Negroes from state grand and petit juries; the Court upheld the statute as a valid means of enforcing the Equal Protection Clause. Because each of these three cases was amenable to decision on the narrow basis of an analysis of the Negro defendant's right to equal protection, the Court brought all three under that single analytical umbrella.

But even in 1879 the Court recognized that other constitutional values were implicated. In *Strauder*, the Court observed that the exclusion of Negroes from jury service injures not only defendants, but also other members of the excluded class: it denies the class of potential jurors the "privilege of participating equally . . . in the administration of justice," 100 U. S., at 308, and it stigmatizes the whole class, even those who do not wish to participate, by declaring them unfit for jury service and thereby putting "a brand upon them, affixed by law, an assertion of their inferiority." *Ibid.* It is now clear that injunctive relief is available to vindicate these interests of the excluded jurors and the stigmatized class. *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320 (1970); *Turner* v. *Fouche*, 396 U. S. 346 (1970); *White* v. *Crook*, 251 F. Supp. 401 (MD Ala. 1966).

Moreover, the Court has also recognized that the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class,

but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross-section of the community. In *Williams* v. *Florida*, 399 U. S. 78 (1970), we sought to delineate some of the essential features of the jury that is guaranteed, in certain circumstances, by the Sixth Amendment. We concluded that it comprehends, *inter alia*, "a fair possibility for obtaining a representative cross-section of the community." 399 U. S., at 100.[9] Thus if the Sixth Amendment were applicable here, and petitioner were challenging a post-*Duncan* petit jury, he would clearly have standing to challenge the systematic exclusion of any identifiable group from jury service.[10]

The precise question in this case, then, is whether a State may subject a defendant to indictment and trial by grand and petit juries that are plainly illegal in their

[9] The principle of the representative jury was first articulated by this Court as a requirement of equal protection, in cases vindicating the right of a Negro defendant to challenge the systematic exclusion of Negroes from his grand and petit jury. *E. g., Smith* v. *Texas*, 311 U. S. 128, 130 (1940). Subsequently, in the exercise of its supervisory power over federal courts, this Court extended the principle, to permit any defendant to challenge the arbitrary exclusion from jury service of his own or any other class. *E. g., Glasser* v. *United States*, 315 U. S. 60, 83–87 (1942); *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220 (1946); *Ballard* v. *United States*, 329 U. S. 187 (1946). Finally it emerged as an aspect of the constitutional right to jury trial in *Williams* v. *Florida*, 399 U. S. 78, 100 (1970).

[10] It is of course a separate question whether his challenge would prevail, *i. e.*, whether the exclusion might be found to have sufficient justification. See *Rawlins* v. *Georgia*, 201 U. S. 638, 640 (1906), holding that a State may exclude certain occupational categories from jury service "on the bona fide ground that it [is] for the good of the community that their regular work should not be interrupted." We have no occasion here to consider what interests might justify an exclusion, or what standard should be applied, since the only question in this case is not the validity of an exclusion but simply standing to challenge it.

composition, and leave the defendant without recourse on the ground that he had in any event no right to a grand or petit jury at all. We conclude, for reasons which follow, that to do so denies the defendant due process of law.

III

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U. S. 133, 136 (1955). The due process right to a competent and impartial tribunal is quite separate from the right to any particular form of proceeding. Due process requires a competent and impartial tribunal in administrative hearings, *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970), and in trials to a judge, *Tumey* v. *Ohio*, 273 U. S. 510 (1927). Similarly, if a State chooses, quite apart from constitutional compulsion, to use a grand or petit jury, due process imposes limitations on the composition of that jury.

Long before this Court held that the Constitution imposes the requirement of jury trial on the States, it was well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law. Thus a defendant cannot, consistent with due process, be subjected to trial by an insane juror, *Jordan* v. *Massachusetts*, 225 U. S. 167, 176 (1912), by jurors who are intimidated by the threat of mob violence, *Moore* v. *Dempsey*, 261 U. S. 86 (1923), or by jurors who have formed a fixed opinion about the case from newspaper publicity, *Irvin* v. *Dowd*, 366 U. S. 717 (1961).

Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias. This rule, too, was well established long before the right to jury trial was made applicable in state trials, and does not depend on it. Thus

it has been invoked in trials to a judge, *e. g., Tumey* v. *Ohio*, 273 U. S. 510 (1927); *In re Murchison*, 249 U. S. 133 (1955); *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971); and in pre-*Duncan* state jury trials, *e. g., Turner* v. *Louisiana*, 379 U. S. 466 (1965); *Estes* v. *Texas*, 381 U. S. 532, 550 (1965). In *Tumey* v. *Ohio*, *supra*, this Court held that a judge could not, consistent with due process, try a case when he had a financial stake in the outcome, notwithstanding the possibility that he might resist the temptation to be influenced by that interest. And in *Turner* v. *Louisiana*, *supra*, the Court held that a jury could not, consistent with due process, try a case after they had been placed in the protective custody of the principal prosecution witnesses, notwithstanding the possibility that they might not be influenced by the association. As this Court said in *In re Murchison*, *supra*, "[f]airness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." 349 U. S., at 136.

These principles compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.

If it were possible to say with confidence that the risk of bias resulting from the arbitrary action involved here were confined to cases involving Negro defendants,[11]

[11] Or the class may be expanded slightly to include white civil rights workers; see *Allen* v. *State*, 110 Ga. App. 56, 62 (1964) (alternative holding).

then perhaps the right to challenge the tribunal on that ground could be similarly confined. The case of the white defendant might then be thought to present a species of harmless error.

But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases. First, if we assume that the exclusion of Negroes affects the fairness of the jury only with respect to issues presenting a clear opportunity for the operation of race prejudice, that assumption does not provide a workable guide for decision in particular cases. For the opportunity to appeal to race prejudice is latent in a vast range of issues, cutting across the entire fabric of our society.

Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[12]

[12] In rejecting, for the federal courts, the exclusion of women from jury service, this Court made the following observations, which are equally relevant to the exclusion of other discernible groups:

"The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct

It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case. Consequently it is necessary to decide on principle which side shall suffer the consequences of unavoidable uncertainty. See *Speiser* v. *Randall*, 357 U. S. 513, 535–536 (1958); *In re Winship*, 397 U. S. 358, 370–373 (1970) (concurring opinion of Mr. Justice Harlan). In light of the great potential for harm latent in an unconstitutional jury selection system,[13] and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few.

Accordingly, we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law. This certainly is true in this case, where the claim is that Negroes were systematically excluded from jury service. For Congress has made such exclusion a crime. 18 U. S. C. § 243.

IV

Having resolved the question of standing, we turn briefly to the further disposition of this case. There is of course no question here of justifying the system under attack. For whatever may be the law with regard to other exclusions from jury service, it is clear

quality is lost if either sex is excluded." *Ballard* v. *United States*, 329 U. S. 187, 193–194 (1946) (footnote omitted).

[13] *Hill* v. *Texas*, 316 U. S. 400, 406 (1942).

beyond all doubt that the exclusion of Negroes cannot pass constitutional muster. Accordingly, if petitioner's allegations are correct, and Negroes were systematically excluded from his grand and petit juries, then he was indicted and convicted by tribunals that fail to satisfy the elementary requirements of due process, and neither the indictment nor the conviction can stand. Since he was precluded from proving the facts alleged in support of his claim, the judgment must be reversed and the case remanded for further proceedings consistent with this opinion.

SUPREME COURT OF THE UNITED STATES

No. 71–5078

Dean Rene Peters, Petitioner,
v.
C. P. Kiff, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 22, 1972]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE POWELL join, concurring in the judgment.

Since March 1, 1875, the criminal laws of the United States have contained a proscription to the following effect:

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; . . ."

By this unambiguous provision, now contained in 18 U. S. C. § 243, Congress put cases involving exclusions from jury service on grounds of race "in a class by themselves . . . for us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination." *Fay* v. *New York*, 332 U. S. 261, 282–283 (1947).

The consequence is that where jury commissioners disqualify citizens on the grounds of race, they fail "to perform their constitutional duty . . . recognized by § 4 of the Civil Rights Act of March 1, 1875 . . . and fully established since the decision in 1881 of *Neal* v. *Delaware* . . . not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds."

Hill v. *Texas*, 316 U. S. 400, 404 (1942). Thus, "no State is at liberty to impose upon one charged with a crime a discrimination in its trial procedure which the Constitution, and an act of Congress passed pursuant to the Constitution, alike forbid . . . it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution forbids the procedure by which it was obtained." *Id.*, at 406.

It is true that the defendant in *Hill* was a Negro and petitioner here is a white man. It is also true that there is no case in this Court setting aside a conviction for arbitrary exclusions of a class of citizens from jury service where the defendant was not a member of the excluded class. I also recognize that, as in this case, the courts of appeal, reflecting the generally accepted constitutional view, have rejected claims such as petitioner presents here. For me, however, the rationale and operative language of *Hill* v. *Texas* suggests a broader sweep; and I would implement the strong statutory policy of § 243, which reflects the central concern of the Fourteenth Amendment with racial discrimination, by permitting petitioner to challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him. This is the better view, and it is time that we now recognized it in this case and as the standard governing criminal proceedings instituted hereafter. Hence, I join the judgment of the Court.

SUPREME COURT OF THE UNITED STATES

No. 71-5078

Dean Rene Peters, Petitioner,
v.
C. P. Kiff, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 22, 1972]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

There is no longer any question, of course, that persons may not be excluded from juries on account of race. Such exclusions are plainly unlawful and deserving of condemnation. That, however, is not the issue before us. The real issue is whether such illegality necessarily voids a criminal conviction absent any demonstration of prejudice, or basis for presuming prejudice, to the accused.

Petitioner was indicted for the offense of burglary on June 6, 1966, and thereafter convicted. The conviction was reversed on direct appeal, and the case was remanded for a new trial. Petitioner was retried on December 8, 1966, was found guilty and was sentenced to 10 years' imprisonment. Petitioner is not a Negro and the record in no way suggests that race was relevant in the proceedings against him. At trial petitioner made no challenge to the method of selection of the grand and petit juries, and he made no challenge to the array of the petit jury. In his appeal to the Court of Appeals of Georgia, petitioner still made no claim addressed to the method of selection of the grand and petit juries. His conviction was affirmed.

Seven months after his trial, petitioner filed a writ of habeas corpus in the United States District Court,

asserting for the first time that Negroes were systematically excluded from the grand and petit juries. If petitioner's allegations are true, then the officials responsible for the jury selection acted in violation of the Constitution, denying potential Negro jurors the equal opportunity to participate in the administration of justice. *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1879). Moreover, if petitioner's allegations are true, the responsible officials are subject to criminal penalties. 18 U. S. C. § 243. However, in order for petitioner's conviction to be set aside, it is not enough to show merely that there has been some unconstitutional or unlawful action at the trial level. It must be established that petitioner's conviction has resulted from the denial of federally secured rights properly asserted by him. See *Alderman* v. *United States*, 394 U. S. 165, 171–174 (1969); cf. *Jones* v. *United States*, 362 U. S. 256, 261 (1960).

The opinions in support of the majority position do not hold that if petitioner's allegations are true, he has been denied the equal protection of the laws. The Court has held in a long line of cases that a Negro defendant is denied equal protection by the systematic exclusion of Negroes from jury service. See, *e. g.*, *Whitus* v. *Georgia*, 385 U. S. 545 (1967); *Avery* v. *Georgia*, 345 U. S. 559 (1953); *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Carter* v. *Texas*, 177 U. S. 442 (1900); *Strauder* v. *West Virginia*, 100 U. S. 303 (1879). These decisions have been predicated from the beginning on the judicially noticeable fact "that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and, therefore, operate in some cases to deny persons of those classes the full enjoyment of the protection which others enjoy." *Strauder* v. *West Virginia*, *supra*, at 309. See also *Gibson* v. *Mississippi*, 162 U. S. 565, 581 (1896); *Bush* v. *Ken-*

tucky, 107 U. S. 110, 117 (1882); *Neal* v. *Delaware*, 103 U. S. 370, 386 (1880); *Ex parte Virginia*, 100 U. S. 339, 345 (1879). This presumption of prejudice derives from the fact that the defendant is a member of the excluded class, but the Court has never intimated that a defendant is the victim of unconstitutional discrimination if he does not claim that members of his own race have been excluded. See *Alexander* v. *Louisiana*, 405 U. S. 625, 633 (1972).

While the opinion of MR. JUSTICE MARSHALL refrains from relying on the Equal Protection Clause, it concludes that if petitioner's allegations are true, he has been denied due process of law. The opinion seeks to equate petitioner's position with that of a defendant who has been tried before a biased tribunal or one lacking the indicia of impartiality. It has been held that an accused is denied due process if the trier of fact is mentally incompetent, *Jordan* v. *Massachusetts*, 225 U. S. 167 (1912), has a personal interest in the outcome of the proceedings, *Tumey* v. *Ohio*, 273 U. S. 510 (1927), has been subjected to pressures making a dispassionate decision unlikely, *Irvin* v. *Dowd*, 366 U. S. 717 (1961), *Moore* v. *Dempsey* 261 U. S. 86 (1923), cf. *Turner* v. *Louisiana*, 379 U. S. 466 (1965), or has had direct personal involvement with the events underlying a criminal contempt charge. *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971); *In re Murchison*, 349 U. S. 133 (1955). This case plainly falls in none of those categories.

Although the prior cases have not required a showing that the trier of fact was actually affected by prejudice in its deliberations, in every case the circumstances were such as to create a serious "probability of unfairness." *In re Murchison*, 349 U. S., at 136. Recognizing this limitation, the Court in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), found no denial of due process where the determination of guilt had been entrusted to a jury

from which persons opposed to the death penalty had been excluded. The Court rejected as "tentative and fragmentary" scientific evidence tending to show "that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." 391 U. S., at 517. The Court went on to state,

> "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was." 391 U. S., at 517–518.

See also *Fay v. New York*, 332 U. S. 261, 280–281 (1947). Here three members of the Court would establish such a *per se* rule without the benefit of tentative, fragmentary or any other kind of empirical data indicating that all-white juries tend to be prejudiced against white defendants in nonracial criminal proceedings.

The opinion of MR. JUSTICE MARSHALL seeks to magnify this wholly speculative likelihood of prejudice by noting that the effect of excluding "any large and identifiable segment of the community . . . is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable," and "that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." I completely agree that juries should not be deprived of the insights of the various segments of the community, for the "common-sense judgment of a jury," referred to in *Duncan v. Louisiana*, 391 U. S. 145, 156

(1968), is surely enriched when all voices can be heard. But we are not here concerned with the essential attributes of trial by jury. In fact, since petitioner was tried two years before this Court's decision in *Duncan*, there was no constitutional requirement that he be tried before a jury at all. *DeStefano* v. *Woods*, 392 U. S. 631 (1968). Had the State of Georgia proceeded to try petitioner before a judge, I assume the Court would not find it a denial of due process if the judge were not the embodiment of all the "qualities of human nature and varieties of human experience." I do not mean to minimize the importance of these values, but they really have very little to do with the narrow question whether petitioner was convicted by a prejudiced tribunal.

Nor do I believe that the illegality of the alleged exclusion can be viewed as tipping the scales toward finding a denial of due process. The question of a jury's bias or prejudice is totally factual in nature. If the possibility of prejudice is too remote or speculative to support a finding of unconstitutionality, a different result cannot be justified by relying on the element of illegality. The constitutional and statutory prohibition against such conduct is extraneous to the due process question, for it in no way renders the possibility of prejudice less remote or less speculative. If this were a borderline case on the facts, it might conceivably be appropriate to resolve the doubt against the State due to its complicity in the alleged unlawul discrimination. But, judging from all existing authority, this is not a close case at all.

The concurring opinion of MR. JUSTICE WHITE, as I read it, rests on the statutory prohibition against racially exclusive juries found in 18 U. S. C. § 243. The opinion draws on dictum in *Hill* v. *Texas*, 316 U. S. 400, 404 (1942), a case involving a Negro defendant, as expressing the "better view" that § 243 invalidates the convic-

tion of any man tried before a jury from which persons have been excluded on account of race.*

A closer look at the statute is warranted. From all indications, § 243 was intended to serve two purposes; first, to make explicit what was implicit in the Fourteenth Amendment, that persons cannot be denied the right to serve on juries because of their race; and second, to prevent racial exclusions from juries by providing criminal penalties for persons violating the statutory command. See *Ex parte Virginia*, 100 U. S. 339 (1879); *Neal* v. *Delaware*, 103 U. S. 370, 386 (1880). Insofar as the statute is declarative of rights secured by the Equal Protection Clause, it provides no authority for reaching a result that the Constitution itself does not require. No case has ever held that § 243 confers extra-constitutional rights on criminal defendants, and there is no support for the view that Congress intended to confer such rights when it enacted this legislation in 1875.

The concurring opinion suggests that an expansive reading of § 243 is appropriate to "implement the strong statutory policy" against the exclusion of persons from jury service on the basis of race. Under this interpretation, the statute is viewed not so much as safeguarding the

*The passage quoted from *Hill* v. *Texas*, *supra*, even if taken at face value, does not mandate reversal in this case. It is expressly limited to the case where "timely objection has laid bare a discrimination in the selection of grand jurors . . . ." 316 U. S., at 406. As indicated earlier, petitioner first made his allegations seven months after his trial. Moreover, assuming *arguendo* that there is a statutory right not to be tried before a racially exclusive jury, it is not clear to me why petitioner's failure to raise the matter in the state courts should not preclude him from raising it on a federal habeas attack. The Court has spoken of a presumption against the waiver of fundamental constitutional rights, see, *e. g.*, *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), but has never intimated that a similar presumption should apply with respect to statutory rights.

rights of the white defendant, but as providing a prophylaxis against discriminatory action in all cases, regardless of any harm that might befall the accused. While Congress surely had the power to implement the policies of the Fourteenth Amendment in this manner, it chose instead to deter such violations of the Fourteenth Amendment by imposing criminal sanctions. It has been apparent, at least until recently, that such sanctions have not satisfactorily served to deter. But it is not for this Court to correct the inadequacies of a statutory enactment. Moreover, it does nothing to promote adherence to the policies of the Fourteenth Amendment to allow a criminal defendant who has made no objection at trial and who has no credible claim of personal prejudice to mount a post-conviction attack alleging that discriminatory jury selection has taken place in the past.